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### The Reawakening of Marriage

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# THE REAWAKENING OF MARRIAGE

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Raymond C. O'Brien \*

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## I. INTRODUCTION

Thirty years after the introduction of no-fault legislation in California, state legislatures are challenged to restrain what was once considered a welcome revolution in domestic relations: no-fault divorce. When the divorce ground of no-fault replaced the fault-specific grounds of adultery, cruelty and desertion, sociologists, academics and lawmakers all united in condemnation of the past and welcome of the new regime. Nonetheless, either as a direct result of, or attendant to no-fault divorce, there are today significantly higher divorce rates than thirty years ago.<sup>1</sup> Worse, there are concomitant surges in poverty among women and children. Children involved in divorces are more prone to psychological disturbance, and they experience far greater rates of poverty.<sup>2</sup> Further, welfare costs to the states rose

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<sup>1</sup> It is estimated that nearly half of all married couples will divorce. See TERRY ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS* 1 (1986). The number of divorces each year has remained steady at around one million per annum throughout the 1980s and 1990s. See Laura Gatland, *Putting the Blame on No-Fault*, 83 A.B.A. J. 50, 51 (1997).

<sup>2</sup> See generally NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *A FAMILY PERSPECTIVE IN CHURCH AND SOCIETY* 4 (1998); COUNCIL ON FAMILIES IN AMERICA, *MARRIAGE IN AMERICA: A REPORT TO THE NATION* (1995); NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 252-56 (1991) [hereinafter *BEYOND RHETORIC*]; Elizabeth Scott, *Rational Decision-Making About Marriage and Divorce*, 76 VA. L. REV. 9 (1990); James McLindon, *Sepa-*

dramatically.<sup>3</sup> The issue thus arises: Should no-fault divorce be curtailed so as to preserve the family for the sake of the children? Something has gone wrong. The new-age augurs of sociologists, academics and lawmakers grapple with the formerly unthinkable, that the no-fault divorce revolution in America has failed. Increasingly, there are suggestions, among many possibilities, of a return to fault divorce to keep families together. Robert Herrick's ode rings true:

Thus times do shift, each thing his turn does hold:  
New things succeed, as former things grow old.<sup>4</sup>

The current reconsideration of no-fault legislation and with it the importance of marriage to economic security arrive at a propitious time. Three undercurrents within American society have converged to place marriage at the focus of public scrutiny. First, the Hawaii Supreme Court decision of *Baehr v. Lewin*<sup>5</sup> intoxicated civil and social conservatives and liberals with the possibility that the definition of marriage has changed to incorporate two persons of the same sex.<sup>6</sup> Meeting this challenge to what the United States Supreme Court has called "the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution,"<sup>7</sup> federal and state legislatures statutorily limited the definition of marriage as between a man and a woman.<sup>8</sup> But the debate

*rate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Robert Cochran, Jr. & Paul Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327 (1983).

<sup>3</sup> Elimination of Aid to Families With Dependent Children and adoption of the 1996 Personal Responsibility and Work Opportunity Act have reduced overall welfare rolls by almost 50 percent from their highs in 1994. Poverty rates among families with children headed by a single mother are down 5 percent from the 1994 high. Those persons previously receiving welfare are reported to be in low-paying jobs or relying on churches or family for support. See Mary Jo Bane, *Poverty, Welfare and the Role of Churches*, AMERICA, Dec. 4, 1999, at 9.

<sup>4</sup> Robert Herrick, *Ceremonies for Candlemas Eve* (citing Hesperides), quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 241 (16th ed. 1992).

<sup>5</sup> 852 P.2d 44 (Haw. 1993). The Hawaii court has since held that a 1998 amendment to the state constitution granting the state legislature the right to restrict marriage to persons of opposite sex removed the matter from the ambit of equal protection. See *Baehr v. Miike*, 26 Fam. L. Rep. (BNA) 1075 (Haw. 1999).

<sup>6</sup> See generally WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1997); Raymond C. O'Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMPLE POL. & CIV. RGTS. L. REV. 429 (1998); David O. Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997); William Galston, *Public Morality and Public Policy: The Case of Children and Family Policy*, 36 SANTA CLARA L. REV. 313 (1996).

<sup>7</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>8</sup> See, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 U.S.C. & 28 U.S.C.). The Act provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

1 U.S.C. § 7 (Supp. 1998).

sparked reflection on the importance of marriage in society, and why marriage is unique and trans-cultural.

In the national debate over whether two persons of the same-sex should be denied a license to marry, the nation listened in on a class on marriage itself. State legislatures discovered that getting divorced often took a year of residency, grounds and litigation; getting married took a few days and a few dollars. Legislators concluded that benign neglect had allowed persons easy access to the status of marriage, sociologists found that poor education contributed to a failure to understand the obligations of marriage, and academics found themselves unable to define an essence to marriage as distinct and enduring. The debate over no-fault divorce is a reawakening of an appreciation of marriage. State efforts are more often directed towards no-fault divorce than marriage because, according to a Greek proverb frequently quoted by St. Jerome: "It is easier to mend neglect than quicken love."<sup>9</sup>

The second undercurrent posits that America has witnessed a major revolution in the way government distributes welfare. On August 22, 1996, President Clinton signed into law Public Law 104-193, The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>10</sup> The federal legislation ended sixty-one years of Aid to Families with Dependent Children (AFDC) and replaced it with a capped block-grant program to the states. Among other provisions, the burden of distributing limited federal welfare funds shifts to the states. The states are empowered by law to withdraw support from low-income parents and children for any number of reasons, including failure to comply with employment requirements or participation in employment preparation, establishment of paternity, and outright restrictions on providing aid to some immigrant families,<sup>11</sup> unwed teenage mothers, felons, and drug abusers.<sup>12</sup> Previously, children whose parents met the means-test defined by AFDC had a consistent safety net of support.<sup>13</sup> This safety net is now gone, replaced by Congress and the President with an "opportunity society"<sup>14</sup> which fosters a culture of opportunity rather than entitlement and redistribution.

It is fair to point out that while the PRWORA eliminated the safety net for poor families, it did provide additional federal mandates to collect support from

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<sup>9</sup> Saint Jerome, *Letter 7*, quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 113 (16th ed. 1992).

<sup>10</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

<sup>11</sup> See *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997), *aff'd*, 179 F.3d 29 (2d Cir. 1999) (challenging provisions of the new welfare legislation restricting benefits to immigrants).

<sup>12</sup> See generally *Foreword* to The Personal Responsibility and Work Opportunity Act of 1996.

<sup>13</sup> Aid to Dependent Children was established by the Social Security Act of 1935 and later renamed Aid to Families with Dependent Children (AFDC). The program was designed to provide cash welfare payments for needy children whose parents are unable to provide support and are incapacitated, absent from the home continuously, deceased or unemployed. See HOUSE COMM. ON WAYS AND MEANS, 104TH CONG., 2D SESS., *BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS* 383, 384 (Comm. Print 1996).

<sup>14</sup> CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 65-77 (Ed Gillespie & Bob Schellhas eds., 1994).

parents which states must enforce. Thus there is a newly established case registry and parent locator service, mandatory adoption of the Uniform Interstate Family Support Act,<sup>15</sup> access to all government and private information within multiple computer networks, volume case processing, and expedited administrative procedures to facilitate subpoena issuance and asset seizure.<sup>16</sup> The success of these collection measures is still uncertain, although the Department of Health and Human Services (HHS) reports child support recovery has increased twenty percent since the welfare legislation became effective.<sup>17</sup> Still, almost eighty percent of parents escape payment, and large numbers of children are unable to return to the safety net of federal AFDC payments.

While AFDC may have fostered an atmosphere of entitlement, the new welfare structure is meant to foster a work solution. Arguably, entitlement fostered moral inculcability by supporting non-marital children, laziness, and a class of persons termed the "undeserving poor." By mandating employment and limiting both the time and the amounts of welfare to be received, PRWORA responds to a tenet of American social policy: work is good. But if work is good, and work is at the heart of the new welfare law, then feasibility of massive employment opportunities today and in the future is necessary to provide an equitable result for custodial parents and children. The absence of work opportunities will jeopardize the linchpin of welfare legislation. Single parents unable to find employment and without the safety net of welfare subsistence, have little recourse for themselves or for their children. This is the argument made by both opponents and proponents of the new welfare legislation.<sup>18</sup>

Albeit Malthusian, substantial evidence exists to support the conclusion that the American economy is entering an employment-decreasing, post-industrial phase.<sup>19</sup> This phase is associated with corporate downsizing, cybernation, a global-

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<sup>15</sup> 9 U.L.A. 255 (1996). See 42 U.S.C. § 666(F) (1997) (requiring states to enact the Uniform Interstate Family Support Act to receive federal funding of child support enforcement).

<sup>16</sup> See generally Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695 (1997); Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Reform Act*, 30 FAM. L.Q. 519 (1996).

<sup>17</sup> See Judith Havemann, *Child Support Recovery Has Gone up 20 Percent*, WASH. POST, April 2, 1999, at A27 ("Child support collections have increased from \$12 billion in 1996 to \$14.4 billion in 1998. The percentage of cases where some money was collected grew from 20.5 percent in 1996 to 22.1 percent in 1997.").

<sup>18</sup> See, e.g., *Status of Welfare Reform: Hearings Before the Subcomm. on Human Resources of the House Ways and Means Comm.*, 105th Cong. (1998) (statement of J. Jean Roger, Department of Health and Social Services, Madison, Wis.) (supporting the legislation); Glenn C. Loury, *Welfare Pair*, NEW REPUBLIC, Jan. 5, 1998, at 10 (opposing the work possibilities).

<sup>19</sup> See generally Alan Finder, *Evidence is Scant That Workforce Leads to Full-Time Jobs*, N.Y. TIMES, April 12, 1998, at 1; Stephen Franklin, *Signals Mixed in Job Sector; Unemployment Falls, But Layoffs Rising*, CHI. TRIBUNE, Dec. 5, 1998, at 1 (citing loss of 245,000 factory jobs since March 1998); Steven Greenhouse, *Many Participants in Workfare Take the Place of City Workers*, N.Y. TIMES, Apr. 13, 1998, at 1; Thomas Hargrove, *Federal Cutbacks Hit Blue-Collar Jobs Hardest*, MILWAUKEE J. SENTINEL, Mar. 22, 1998, at 4 (citing more than 316,000 blue-collar positions that have been eliminated since 1993); Joel Kotkin, *A Look at . . . Downtown's Prospects; Fixing the Engine of Urban Life*, WASH. POST, Feb. 14, 1999, at B3 (citing the erosion of well-paying blue collar jobs); Joel Kotkin and David Friedman, *Put a Cork in It; As*

ized work force, and a sharply diminished need for labor in the production process.<sup>20</sup> The resurgence of the Asian economy will likely siphon additional jobs from American low-wage workers. American unemployment is at its lowest rate in twenty-nine years, but this statistic masks a drop in actual employment opportunity; manufacturing has lost 381,000 jobs in the last twelve months, industrial machinery firms lost 89,000, and the electrical equipment industry lost 69,000.<sup>21</sup> If the post-industrial age is identified by a decrease in jobs that would normally be held by working poor, then the federal welfare legislation is at an impasse: Requiring work is no longer an alternative if work is unavailable.

The economics of post-industrial unemployment is pertinent now because of the poverty so attendant to divorce. This is dramatically true for children of divorced parents, as they are far more likely to be poor than children of married parents.<sup>22</sup> Thus, the introduction of welfare legislation requiring employment, the economic changes prefigured in a post-industrial society, and the significant number of children experiencing poverty because of divorce, occur at a propitious time. If there is a sharply diminished need for labor in the production process, parents will be unable to find employment, particularly meaningful employment. If these conditions presage increased poverty for children, it is logical for the state to keep parents married, decrease opportunities for divorce, and maintain two-income households. No-fault divorce works in tandem with the new federal welfare legislation to precipitate childhood poverty. This is why the states and commentators are concerned with no-fault divorce.

But the welfare legislation does more than contribute to the chances of poverty for children. The legislation establishes a definition of family which works best for the state, and that definition incorporates marriage as a norm. The legislation significantly restricts support for single parents and children, creating disincentives for forming such families. The welfare legislation identifies an undercurrent in society which defines family within the confines of marriage. The legislation makes marriage the norm.

A third undercurrent in American society is the flirtation between secular political authorities and what one public policy analyst terms "faith-based moral

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*Wall Street Pats Itself on the Back, Trouble Lurks Behind the Boom*, WASH. POST, May 24, 1998, at C1 (citing dropping wages over the last decade for 20 percent of the bottom of the workforce); Patrick J. McDonnell, *Jobs Exist for Immigrants*, L.A. TIMES, May 4, 1998, at B1 (citing a decline in the number and wages of low-paying blue-collar jobs); Laura D'Andrea Tyson, *Inequality Amid Prosperity*, WASH. POST, July 9, 1997, at A23; Viewpoints, *Simply Put: Workfare Doesn't Work*, BUFFALO NEWS, June 20, 1997, at C3.

<sup>20</sup> See generally THOMAS MASSARO, CATHOLIC SOCIAL TEACHING AND UNITED STATES WELFARE REFORM 234-36 (1998) [hereinafter MASSARO, SOCIAL TEACHING]; GARY TEEPLE, GLOBALIZATION AND THE DECLINE OF SOCIAL REFORM (1995); JEREMY RIFKIN, THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA (1995); ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM (1991).

<sup>21</sup> John M. Berry, *U.S. Jobless Rate Lowest in 29 Years*, WASH. POST, Apr. 3, 1999, at D11.

<sup>22</sup> BEYOND RHETORIC, *supra* note 2, at 253 ("Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents.").

principles.”<sup>23</sup> Specifically, secular authorities – the states – are adopting positions and programs long associated with religious sponsorship. For example, two states have adopted covenant marriage legislation and other states have considered it.<sup>24</sup> Covenant marriage allows a couple to restrict divorce within that state to grounds normally associated with fault divorce, grounds derived from religious-based divorce grounds. Another state, Florida, has adopted a program which requires high schools to educate students about the permanence of marriage, and the state allows for marriage preparation and parenting classes that are conducted by religious denominations and pastors.<sup>25</sup> Thus, legislation and judicial decisions have accommodated faith-based principles which further secular public policy,<sup>26</sup> and allowed for couples to enter into marriage which may only be dissolved upon traditional religious grounds of adultery, cruelty and desertion.

State accommodation of religious programs has been a necessary staple in American public policy; state benefits accommodate an incidental religious mission. For example, Sunday closing laws possess a particular religious identification, but the state accommodates this basis within neutral public policies of rest and leisure.<sup>27</sup> But in a religiously plural society, how far may a state go in utilizing religious practices and programs? Often what is really at issue is the ability of a majority of persons who happen to share a religious belief *plus* a political majority to enact their religious beliefs into public legislation. For example, litigation has resulted because a public school in a predominantly Christian area of the country incorporates Christian prayer into its public events.<sup>28</sup> A non-Christian in that area may well object to the inclusion of Christian prayers into public events as the establishment of religion. Or in another example, if a state demands that a couple entering into marriage, or contemplating divorce, participate in a religious program which will sustain the marriage and preserve the family, is such a program establishment of religion? Florida’s adoption of plans to teach marriage in high schools and require counseling upon divorce are developments which test the limits of reli-

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<sup>23</sup> MASSARO, SOCIAL TEACHING, *supra* note 20, at xiii.

<sup>24</sup> Louisiana and Arizona have adopted covenant marriage. *See generally* Melissa S. LaBauve, *Covenant Marriages: A Guise for Lasting Commitment?*, 43 LOY. L. REV. 421 (1997); Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998).

<sup>25</sup> *See* FLA. STAT. ANN. § 232.246(1) (West Supp. 1999) (high school graduation); FLA. STAT. ANN. § 741.0305 (West Supp. 1999) (premarital preparation course); FLA. STAT. ANN. § 61.21(1) (West Supp. 1999) (parenting course).

<sup>26</sup> *See, e.g.*, Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (permitting school vouchers to be used at sectarian and non-sectarian schools); Kagin v. Kopowski, 10 F. Supp. 2d 756 (E.D. Ky. 1998) (ordering all divorcing parents to take parental counseling program conducted by an agency of the Catholic Church); Witt v. Ristaino, 701 A.2d 1227 (Md. Ct. Spec. App. 1997) (ordering non-custodial parent to pay for parochial education even though no particular educational need).

<sup>27</sup> *See* McGowan v. Maryland, 366 U.S. 420 (1961).

<sup>28</sup> *See, e.g.*, Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3325 (U.S. Nov. 15, 1999) (No. 99-62) (deciding if public football games in a small Texas town could begin with prayers); Wallace v. Jaffree, 472 U.S. 38, 40 n.2 (1985) (finding an Alabama statute unconstitutional for mandating a period of silence in public schools so the students and teachers might engage in meditation or voluntary prayer) (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

gious accommodation but also demonstrate a reawakening of an appreciation of marriage.

It is natural that the state would turn to religion for assistance with social issues. Religious institutions, particularly the Roman Catholic Church, provide a plethora of social services. The state has been a partner with religion in providing these services as long as the services are not "pervasively sectarian."<sup>29</sup> The partnership spans from infant and maternity homes, to hospice and elderly facilities. Federal and state monetary contributions are significant. Indeed, with the exception of the vast educational network sponsored by the church, the majority of monetary support for religious-sponsored programs comes not from bishops' annual appeals, but from state and federal grants and United Way contributions.<sup>30</sup> Cities and states are either considering or adopting voucher programs which would allow public funds to be used at private schools, indicating an expansion of the integration of religious and secular efforts.<sup>31</sup> And there are other examples of such expansion.

Recently a federal district court upheld the constitutionality of an order of a Kentucky circuit court which required all divorcing parents to take a parental counseling program run by an agency of the Roman Catholic Church.<sup>32</sup> Only those couples with minor children are required to attend such courses and each participant must pay a \$15 registration fee.<sup>33</sup> The program is presented by laypeople, who may or may not be Roman Catholic, and there is no evidence that the program explicitly teaches Catholic doctrine, nor is there any effort at conversion of the parties.<sup>34</sup> The court rejected an establishment argument, holding that the program sponsored by the church promotes the interests of the state by promoting family harmony and minimizing litigation.<sup>35</sup> Any program which had the same non-sectarian purpose could be substituted for the one administered by the church.<sup>36</sup>

The Kentucky parental counseling program is an effort to keep couples together and to protect children from the consequences of divorce. As is being discussed in many legislatures, the issue is whether the state is willing to utilize the vast network of religious programs designed to prepare couples for marriage, counsel them during marital difficulties, and imply that divorce is not an acceptable

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<sup>29</sup> See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

<sup>30</sup> See CHARLES R. MORRIS, *AMERICAN CATHOLIC* 313 (1997).

<sup>31</sup> See, e.g., *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (holding that a state voucher program by which students could attend private nonsectarian schools with state funds has a secular purpose and does not violate the Establishment Clause).

<sup>32</sup> See *Kagin v. Kopowski*, 10 F. Supp. 2d 756 (E.D. Ky. 1998).

<sup>33</sup> See *id.* at 758.

<sup>34</sup> See *id.* New legislation in Florida allows the court to require either or both parties to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi or other person deemed qualified by the court and acceptable to the party or parties. The consultation may only delay the proceedings up to three months. See FLA. STAT. ANN. §§ 61.052 (2)(b)1&2 (West Supp. 1999).

<sup>35</sup> See *Kagin*, 10 F. Supp. 2d at 758.

<sup>36</sup> See *id.* at 761.



option. Through such programs states are developing a renewed appreciation of marriage as an institution. The most significant program to date, Florida's Marriage Preparation and Preservation Act<sup>37</sup> presents the opportunity for stronger state utilization of religious programs enhancing marriage and family preservation. The flirtation between secular authorities and faith-based religious programs proffers opportunities for both. Secular authorities have a public policy investment in a family structure which will provide for economic and social security for the participants and their children. For religion, this is an opportunity to evangelize within a neutral state purpose.

This Article concludes that the convergent societal pressures from the same-sex marriage debate, the effect of the welfare legislation to define family, and the allowance of greater religious involvement in marriage preparation and divorce will precipitate a reawakening of marriage. The emergence of covenant marriage, the public debate over no-fault divorce, the resurgence of fault grounds, and Florida's enactment of its Marriage Preparation and Preservation Act are ramifications of this reawakening. Public concern over the frequency of divorce and the resulting adverse consequences for children and adults, indicate a change in attitude concerning marriage, divorce and family. Covenant marriage is simply the beginning of this process; the Florida legislation is a better and more involved approach. The litigation over same-sex marriage and the adoption of sweeping changes to welfare distribution in the United States focus new attention on the importance of marriage and its attendant responsibilities; they focus attention on the family. Thus, thirty years after no-fault divorce, attention shifts from no-fault opportunities to marriage instruction.

It seems reasonable that other states will increasingly follow the lead of Florida and incorporate secular and religious instructional programs that seek to strengthen the institution of marriage. Such state efforts reflect state interests in protecting children and adults by providing for stability in relationships through a better appreciation of marriage rather than more difficulty in obtaining a divorce. In so doing, the state will tangentially recreate a more secure definition of family, one less individualistic and more committed to the parties' viability. If the state is successful in reawakening an appreciation of form marriage, then the question arises as to what effect this will have upon functional relationships such as domestic partnerships or reciprocal beneficiaries.<sup>38</sup> Surely too much time has passed to denigrate the commitment of couples committed to relationships other than marriage. It is likely that the reawakening of marriage will allow for increased recognition of alternatives to marriage as these alternatives will be less threatening.

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<sup>37</sup> 1998 Fla. Sess. Law Serv. 98-403 (West) (codified at scattered sections of FLA. STAT. ANN. (West Supp. 1999)).

<sup>38</sup> See, e.g., H.B. 118, 19th Leg., Regular Sess. (Haw. 1997) (providing a detailed list of benefits for reciprocal beneficiaries).

## II. DIVORCE

A. *The Demise of Marriage*

The millennium ends with a report from the Rutgers University's National Marriage Project finding that "Americans are less likely to marry than ever before."<sup>39</sup> The report should not come as a surprise since statistics concerning the demise of what was considered the typical American family forty years ago have been very clear in direction for more than a decade. This dissolution of the American family is not a result of the availability of divorce, but rather the irrelevance of marriage. And marriage is at the heart of what has been termed "form family."<sup>40</sup> Past legislation, judicial decisions and numerous academic surveys record the importance of marriage and what can be defined as "form family."<sup>41</sup> If marriage is the most important relation in life, a fundamental right,<sup>42</sup> its glory lay in media portrayal and parental participation. Old movies and television sitcoms consistently portrayed suitors asking parents for the hand of a daughter, the welcoming of a son-in-law to the family and the fighting but eventual reconciliation in many a marriage. This all changed.

It is arguable that marriage suffered a demise because the formalities to enter into marriage were too lax. Marriage was cheapened by its easy availability. True, many states today allow for common law marriage, provable through a holding out as husband and wife of two qualified persons for a sufficient period of time.<sup>43</sup> In the remaining states, the requisite formalities of a valid marriage, even the requiring of a license, are not absolutely necessary.<sup>44</sup> Requirements as to minister, a blood test, and waiting periods are minimal at best, each accommodated within the rhetoric of a fundamental right to marry.<sup>45</sup> Formalities have been consistently minimized, the substance of the relationship derived instead from the marital commitment between the two parties. Marital commitment is filtered through a media message which never addresses the difference between a couple living together outside of marriage and one living together within the marital relationship. The media makes both out to be at-will relationships, easily dissolvable at will of

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<sup>39</sup> Michael A. Fletcher, *For Better or Worse, Marriage Hits a Low*, WASH. POST, July 2, 1999, at A1. The report found that the nation's marriage rate has fallen by 43 percent in the past four decades, from 87.5 marriages per 1,000 unmarried women in 1960 to 49.7 marriages per 1,000 unmarried women in 1996. See *id.*

<sup>40</sup> See *infra* note 41.

<sup>41</sup> See *City of Ladue v. Horn*, 720 S.W.2d 745 (Mo. Ct. App. 1986) (defining form family as "[o]ne or more persons related by blood, marriage or adoption . . . as an individual housekeeping organization").

<sup>42</sup> See *Zablocki v. Redhail*, 434 U.S. 374 (1978); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (defining marriage as fundamental to our very existence and survival).

<sup>43</sup> See, e.g., *Crosson v. Crosson*, 668 So. 2d 868 (Ala. Civ. App. 1995).

<sup>44</sup> See, e.g., *Nelson v. Marshall*, 869 S.W.2d 132 (Mo. Ct. App. 1993).

<sup>45</sup> For a discussion of the formalities, see HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS* 85-100 (2d ed. 1987).

either party.

As the states minimized their objective restrictions on entering into the marriage, the individuality of the marital contract as subjectively formed by the couple itself increased. This individuality lessens the objective identity of marriage, making it less easily defined,<sup>46</sup> and thus significant numbers of commentators offer the conclusion that marriage is less a social force.<sup>47</sup> Couples had to balance many factors heretofore assumed within the objective confines of what it meant to be married. For example, large numbers of women entered the workforce, establishing two-paycheck families, and with husband and wife working, and each earning a salary, marital duties strictly associated with gender became blurred.<sup>48</sup> The father was expected to do home and child-rearing functions; the wife was expected to earn a living, keep and advance at employment, and provide for the material needs of the family. This role obfuscation made marriage less secure; negating some of the popular media messages, and implied that religious structures of marriage, which had provided a natural law permanence, were less natural and hence not necessarily permanent.<sup>49</sup>

Religious organizations were slow to recognize the changes in society, perhaps because of denial but perhaps because they too were undergoing change and were preoccupied. Changes in marriage, family and responsibility soon affected every facet of religious observance. Religion, ordering a bond that is indissoluble if not always sacramental, was caught in the maelstrom of social change.

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<sup>46</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding to the lower court for a determination to assess the compelling state interest associated with prohibition of same-sex marriages). Upon remand, the Circuit Court of Hawaii found that the state failed to demonstrate a compelling state interest to demonstrate that the public interest in the well being of children would be adversely affected by same-sex marriage. See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 31, 1996). Before the Hawaii Supreme Court could act upon the remand, the people of Hawaii adopted a constitutional amendment defining marriage as between persons of the opposite sex. The Hawaii constitutional amendment permitted Hawaii legislators to forbid marriage between persons of the same sex, thus deflating the preceding judicial efforts. Nonetheless, the controversy prompted Hawaii to become the first state to pass a comprehensive statewide domestic partnership statute seeking to equalize benefits between couples of the same and couples of the opposite sex. These benefits include health insurance, retirement, inheritance, election against a partner's last will and testament, and wrongful death rights. See H.B. 118, 19th Leg., Regular Sess. (Haw. 1997). The constitutional amendment has made the issue of same-sex marriage moot. See *Baehr v. Miike*, 26 Fam. L. Rep. (BNA) 1075 (Haw. 1999).

<sup>47</sup> See, e.g., David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431 (1996); Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976); Victoria Mikesell Mather, *Evolution and Revolution in Family Law*, 25 ST. MARY'S L.J. 405 (1993).

<sup>48</sup> See generally MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981); J. THOMAS OLDHAM, *DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY* (rev. ed. 1997); June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303 (1994). For an excellent analysis of the gender obfuscation caused by depriving men of traditional roles associated with power and replacing the roles with a culture of adornment, see SUSAN FALUDI, *STIFFED* (1999).

<sup>49</sup> See *Baehr*, 852 P.2d at 62 (quoting *Loving v. Virginia*, 388 U.S. 1, 3 (1966) (quoting the trial judge, asserting that the Deity may have changed His mind as to interracial marriages and trial judges are not the ultimate authorities on the subject of the permanence of the Divine Will)).

The disruption occurred not because of the introduction of no-fault divorce, but because of reluctance to grasp the change going on in marriage itself. American Catholic bishops admitted the upheaval. Writing in preparation for the United Nations' International Year of the Family in 1994, they wrote to family members:

We know you face obstacles as you try to maintain strong family ties and to follow your calling as a church of the home. The rapid pace of social change; the religious, ethnic, and cultural diversity of our society; the revolution of values within our culture; the intrusion of mass media; the impact of political and economic conditions: all these place families under considerable social stress.<sup>50</sup>

The stress has been brought on by role redefinition and the development of a heightened sense of individualism. Professor Mary Ann Glendon recognized the shift in attitude nearly twenty years ago, opining that the family exists for the benefit of the individual and not the individual existing for the benefit of the family.<sup>51</sup> There was the added stress of feminism, a status which incorporated both single mothers and single women.<sup>52</sup> There was also an unparalleled mass media blitz which deprived the American religious culture its segregated sanctuaries. Charles R. Morris, writing of American Catholics, makes a link to what happened to all religions by the middle of the twentieth century. There was, according to the author:

the gradual secularization of the lower and middle classes. Traditional ethnic communities were breaking up — not just Catholic and Jewish urban villages, but Midwestern Lutheran farm towns and southern Baptist hamlets. The postwar generation was assimilating into a broader American culture that, if not quite areligious, was at least highly latitudinarian.<sup>53</sup>

No one can deny that the American media establishes values, especially among the young in their most formative years. In recognition of this, the National Commission On Children recommends that "parents be more vigilant and aggressive guardians of their children's moral development, monitoring the values to which their children are exposed, discussing conflicting messages with their chil-

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<sup>50</sup> National Conference of Catholic Bishops, *Follow the Way of Love*, in 6 PASTORAL LETTERS AND STATEMENTS OF THE UNITED STATES CATHOLIC BISHOPS (1989-1997) at 595 (Patrick W. Carey ed., 1998).

<sup>51</sup> See generally GLENDON, *supra* note 48. Catholic social theory integrates individuality and interdependence in the following: "Human dignity is reflected in one's ability to live life manifesting a healthy balance between autonomy and interdependence." CATHOLIC CHARITIES USA, TRANSFORMING THE WELFARE SYSTEM: A POSITION PAPER OF CATHOLIC CHARITIES USA 4 (1994).

<sup>52</sup> For an integration of welfare reform, feminism and motherhood, see generally Linda J. Lancey, *As American as Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers, and Welfare Rhetoric*, 82 CORNELL L. REV. 79 (1996) (book review).

<sup>53</sup> MORRIS, *supra* note 30, at 254.

dren, and if necessary, limiting or precluding their children's exposure to images that parents consider offensive."<sup>54</sup> But the American media culture also levels distinctiveness, tolerating only minimal uniqueness as a sort of flavoring in an amalgam called pluralism. It is interesting that in a culture so devoted to individuality, the effect of the American media is one of amalgamation. And the media effect upon religion is either patronizing or combative, never neutral. Regarding marriage, the media presents a choice between staunchly affirming the religious sound bite: "Wives be submissive to your husbands," or lingering on the impotence of religion to complement a failing family unit. Religion is portrayed as either a powerful bully or an mawkish wisp. Few media depictions scrutinize the religious underpinnings of marriage.

In spite of the Pope's massive popularity with the media as he travels from culture to confrontation, religions themselves have been slow to adapt to the media age. Few understand that the message is being lost and the image being televised is newsworthy only because it is curious or eccentric. Most religious messengers find themselves accepting the inevitability of social change, and responding to each social movement with a clarification or sparing disagreement. The message is being lost. There are televangelist programs, and the American Catholic bishops admitted as much with their issuance of a pastoral letter in 1985 proposing utilization of "all available communication media" in the promotion of its mission.<sup>55</sup> But religion is largely unable to compete in secular media channels of information.<sup>56</sup> Financial considerations predominate, and often religious broadcasting finds itself preaching to the choir rather than providing a voice in the marketplace.

The inability to convey a message concerning marriage is part of the church's failure to communicate effectively. If marriage is ever to regain a preeminence among social institutions it will need a religious contribution. Religion can provide a moral content, a transnational and transcendental base. Harvard law professor Mary Ann Glendon laments that laws in America are unique in that they are stripped of any moral premise.<sup>57</sup> In her words, laws are not just rules of behavior. They are constitutive — they express, and help define, who people are. "What sort of meaning is family law creating and what sort of society is it helping to constitute?"<sup>58</sup> The constitutiveness of American law must take into account the different gender roles and responsibilities, the pervasiveness of human sexuality, the ascendancy of individualism, and relate them to an anthropomorphic level. Likewise, religion must both respond to this secular standard and offer a constructive pro-

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<sup>54</sup> BEYOND RHETORIC, *supra* note 2, at xxxiv.

<sup>55</sup> National Conference of Catholic Bishops, *In the Sight of All, Communications a Vision All Can Share*, in 5 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS (1983-1988) at 181 (Hugh J. Nolan ed., 1989).

<sup>56</sup> There was a time when the secular media and religion relied on each other to respectively portray dogma and sell movie seats. These were the days of movies like *The Bells of St. Mary's* and *Going My Way* during the 1940s. See MORRIS, *supra* note 30, at 196-200.

<sup>57</sup> See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

<sup>58</sup> *Id.* at 9.

posal for the future. American Catholic bishops now emphasize that:

Marriage is the partnership of a man and a woman equal in dignity and value [and] . . . a couple who accepts their equality as sons and daughters in the Lord will honor and cherish one another . . . . They will "be subordinate to one another out of reverence for Christ" (Eph. 5:21) . . . . True equality, understood as mutuality, is not measuring out tasks (who prepares meals, who supervises homework, and so forth) . . . [it] leads to a joyful willingness . . . . Both of you are co-creators of your relationship.<sup>59</sup>

Human sexuality is pervasive in the American media; religion presents it as an aspect of the marital relation. The American Catholic bishops write that:

Sexuality . . . is not merely a matter of biology nor is it simply a source of personal pleasure . . . . It is realized in a truly human way only if it is an integral part of the love by which a man and a woman commit themselves totally to one another until death . . . . In truth, the Church teaches that there are two aspects of marital intercourse — the strengthening of the interpersonal unity between the spouses and the procreation of new life.<sup>60</sup>

The influence of the American culture upon the bishops' statements is unmistakable; so too, the statements have a marked resemblance to creedal statements of other denominations, some non-Christian. While some may disagree, there is evidence, that in addition to pluralism, the statements offer proof of the cultural shift in the definition of marriage. There is less emphasis upon divinity and more acceptance of the individual. The objective must be to incorporate both within the mutuality of the union. The effort to do this is current. When the definition of marriage was changing in the American culture and nothing was being said to accommodate religious transcendence, a vacuum resulted. During this vacuum divorce became more of an option. Indeed, divorce became an acceptable option, if for no other reason than that marriage had lost its transcendence and external standards. Instead, "people are free to define 'right and wrong' pretty much as they please."<sup>61</sup> To reawaken marriage, the institution's transcendence must be reasserted and one of the methods by which this may occur is through religion.

The reestablishment of marital transcendence does not necessarily have to be religious. Virtue and altruism, and even patriotic fervor could suffice. For example, commentators offer a transcendent standard when they argue that no-fault di-

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<sup>59</sup> National Conference of Catholic Bishops, *supra* note 50, at 600.

<sup>60</sup> National Conference of Catholic Bishops, *Human Sexuality from God's Perspective*, in 6 PASTORAL LETTERS AND STATEMENTS OF THE UNITED STATES CATHOLIC BISHOPS (1989-1997) at 529 (Patrick W. Carey ed., 1998).

<sup>61</sup> MORRIS, *supra* note 30, at 419.

orce should be abolished because of the need to protect the children. Mutual satisfaction of the marital parties, stability in relationships, less predatory sex and economic enterprise could easily be others. However, simply eliminating or curtailing no-fault divorce is not an appropriate standard as it is inherently punitive and would handicap only those with too little funds to travel to other more lenient jurisdictions.<sup>62</sup> But all of these standards are being debated. No-fault divorce is simply an effect of the demise of marriage. All discussion inevitably leads towards reawakening a distinctiveness in marriage. Religious institutions have the most accessible and recognizable message, but the reawakening of marriage is not a religious phenomenon alone, it is a cultural one.

### B. *The Rise of No-Fault Divorce*

Prior to the Protestant Reformation in the sixteenth century there was no statutory divorce in the Western world.<sup>63</sup> Annulment, which established the fact that no marriage ever existed because of certain defined grounds was the only way, other than death of one of the parties, to end a marriage. Because Protestant reformers rejected the status of marriage as a religious sacrament, marriage became primarily a civil matter with religious blessing. Eventually, American civil authorities followed the lead of Protestant England and allowed for marriage to be dissolved when one of the parties committed a fault so great as to go to the heart of the marriage. Divorce could be merely from bed and board, *a mensa et thoro*, providing for legal separation but no possibility of remarriage, or the divorce could be final, *a vinculo matrimonii*, allowing for remarriage. Either divorce could be obtained primarily upon the common law fault grounds of desertion, adultery or cruelty; states would eventually add other grounds by statute.<sup>64</sup>

Corroboration was required to prove a fault ground and only the innocent party was allowed to petition for the divorce. Hence the phrase, "she won't give me a divorce," was synonymous with the right of the innocent party to file against the one at fault. Corroboration was often a product of collusion between the two married parties seeking to end a moribund marriage. Thus, pictures dramatizing the "disposition for and occasion to" commit adultery was all that was required; never did the court require actual pictures of intercourse. Thus, as one New York judge observed, "She is always in a sheer pink robe. It's never blue – always pink. And he is always in his shorts when they catch him."<sup>65</sup> Likewise, cruelty had to be of

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<sup>62</sup> For an early yet dispositive discussion of migratory divorce, see generally W. Barton Leach, *Divorce by Plane-Ticket in the Affluent Society – With a Side Order of Jurisprudence*, 14 U. KAN. L. REV. 549 (1966).

<sup>63</sup> For historical perspective on marriage and divorce in the Christian milieu and its impact upon American law, see JOSEPH MARTOS, *DOORS TO THE SACRED* 343-91 (1991).

<sup>64</sup> The regional nature of divorce laws and attendant judicial maneuvers are discussed in LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 204-08 (2d. ed. 1985). For a summary of the history of no-fault divorce, see Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984).

<sup>65</sup> Walter Wadlington, *Divorce Without Fault, Fault Without Perjury*, 52 VA. L. REV. 32, 33 (1966)

such an extent that it went to the heart of the marriage, but some judges allowed for verbal or repeated annoying acts to constitute sufficient cruelty to dissolve the marriage. Desertion required that one of the parties be absent for at least a year with the intent to desert; the other party had to want to reunite with the absent party.

Even if fault could be proven, there were four common law defenses to any petition for divorce. Sometimes these went beyond the common law and were codified. For example, laches required the aggrieved party to file a timely petition for divorce, while recrimination demanded that the petitioner not have committed an equally egregious offense. Condonation occurred when the petitioner forgave the offense, proven by intimate conduct after knowledge of the particular offense. Collusion was used by the court to deny a divorce when both of the parties fabricated evidence to support the divorce petition. Finally, connivance was used by the respondent to assert that the petitioner was actually responsible for the offense. This occurs when respondent asserts that he or she would never have committed the fault upon which the divorce is petitioned, had the petitioner not afforded the opportunity to commit the offense.<sup>66</sup>

Fault litigation and the ensuing common law defenses must have been the forerunner to daytime soap operas. Upon its stage, the many petty insults and insinuations existent in bad marriages found revenge. Judges resented the travesty of collusive parties petitioning for divorce. And there was the unfair opportunity for many wealthy state residents to fly to foreign jurisdictions and avoid the embarrassment of a state dissolution hearing. Legislatures were mindful of the burden on state courts forced to adjudicate personal details of adult lives. Commentators questioned the necessity and the function of the state in dissolving a status which was increasingly becoming a private matter between two consenting adults. At least in more modern countries, the stage was set for a revision of the divorce laws.

In 1964 the Anglican Archbishop of Canterbury appointed a committee to review divorce in England. In 1966 that committee submitted the Mortimer Report which recommended that divorce be granted in England upon a no-fault ground.<sup>67</sup> In America, in 1965, the Supreme Court established the constitutional right of privacy between two married adults in *Griswold v. Connecticut*,<sup>68</sup> a guarantee of privacy which would soon extend to single adults in *Eisenstadt v. Baird*.<sup>69</sup> America was witnessing a burgeoning right of individual privacy and liberty. The stage was

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(quoting N.Y. HERALD TRIB., Oct. 1, 1965, at 19). See also Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 659 (1984) (describing the use of paid actresses in collusive adultery situations, admitting they knew the husband, the husband would blush and cry, and then the judge would dissolve the marriage).

<sup>66</sup> See, e.g., *Sargent v. Sargent*, 114 A. 428 (N.J. 1920) (denying the petitioning husband a divorce based on adultery, when the husband afforded his wife ample opportunity to commit adultery with the couple's chauffeur).

<sup>67</sup> WALTER WADLINGTON & RAYMOND O'BRIEN, *DOMESTIC RELATIONS: CASES AND MATERIALS* 70 (4th ed. 1998) (quoting PUTTING ASUNDER, A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966) (report of a group appointed by the Archbishop of Canterbury in January 1964)).

<sup>68</sup> 381 U.S. 479 (1965).

<sup>69</sup> 405 U.S. 438 (1972).



set for California to become the first state to provide for no-fault divorce in 1969. The no-fault ground was based upon irreconcilable differences which caused the irremediable breakdown of the marriage.<sup>70</sup> This no-fault panacea eliminated the need for an innocent party, common law defenses and extensive litigation related to adultery, desertion or cruelty. Corroboration of the testimony of one of the parties, with or without fault, that the marriage was irreconcilable, was sufficient to end the union.

By 1970 the National Conference of Commissioners of Uniform State Laws voted to make irretrievable breakdown the sole ground for divorce. The Uniform Marriage and Divorce Act was subsequently approved and a definition of irretrievable was offered: the parties have separated for more than 180 days because of serious marital discord.<sup>71</sup> In 1974 the American Bar Association ratified what was by then a sweeping movement towards no-fault divorce, and today every state has some form of no-fault legislation,<sup>72</sup> though some states retain the traditional fault grounds for divorce as well.<sup>73</sup>

The number of divorces increased prodigiously after the introduction of no-fault. Some estimates are that no-fault was responsible for almost one-fifth of the increase in divorces between 1968 and 1988.<sup>74</sup> Indeed, the divorce rate actually doubled from 1960 to 1990.<sup>75</sup> Nonetheless, after rising rapidly for decades, the divorce rate in the United States has leveled. The cumulative number of divorces granted in 1997 was 1,163,000, a 1 percent increase over the number for 1996.<sup>76</sup> These statistics concerning the rise in the divorce rate during the twentieth century must be viewed from the perspective of the nineteenth. In 1867, 9,937 divorces were granted; by 1900, 55,000 couples were divorced that year.<sup>77</sup> This increase occurred during the time of "fault-only" divorce and amidst warnings that divorce would destroy the fabric of the republic and was a direct result of excessive individualism and self-indulgence.<sup>78</sup> Thus, the conclusion is that a steady and rapid rise in the number of divorces is not unique to the latter half of the twentieth century.

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<sup>70</sup> See CALIF. FAM. CODE § 2310(a) (West 1999).

<sup>71</sup> 9A U.L.A. 91 (1973).

<sup>72</sup> See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765 (1997).

<sup>73</sup> See, e.g., UTAH CODE ANN. § 30-3-1 (1999) (combining 10 grounds for divorce); see also W. VA. CODE § 48-2-4 (1999).

<sup>74</sup> See Maggie Gallagher, *Jersey's Assault on Marriage*, N.Y. POST, Oct. 28, 1998, at 27 (citing *American Economic Review*).

<sup>75</sup> See Peter T. Kilborn, *Shifts in Families Reach a Plateau, Study Says*, N.Y. TIMES, Nov. 27, 1996, at A16.

<sup>76</sup> See MONTHLY VITAL STAT. RPT. (Centers for Disease Control and Prevention), July 28, 1998, at 3. In 1996, there were 4.3 divorces per 1,000 population. See MONTHLY VITAL STAT. RPT. (Centers for Disease Control and Prevention), July 17, 1997, at 12.

<sup>77</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 500 (1985).

<sup>78</sup> See MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 10-11 (1985).

No-fault divorce, a recent addition to American history, can easily be seen as the culprit. Thirty years after California's adoption of no-fault legislation, there are repeated attempts to curtail no-fault divorce, the argument being that an easy divorce has resulted in the destruction of the American family. The argument against no-fault does not involve a curtailment of individual liberty, but argues that marriage and family occupy a singular and important role in America, especially when children are involved. Thus, no-fault should be curtailed for the sake of the children. The National Commission on Children emphasizes this premise:

Families formed by marriage — where two caring adults are committed to one another and to their children — provide the best environment for bringing children into the world and supporting their growth and development. Where this commitment is lacking, children are less likely to receive care and nurturing, as well as basic material support. Research on the effects of single parenthood confirms that children who grow up without the support and personal involvement of both parents are more vulnerable to problems throughout childhood and into their adult lives.<sup>79</sup>

The premise of stability for children and the adverse consequences of easy divorce for adults was a motivating factor for the Florida legislature when it passed legislation concerning marriage preparation, consultation upon petitioning for divorce, and parenting courses for couples.<sup>80</sup> Florida concentrated on the need to develop family support mechanisms rather than divorce prohibitions. The premise was based on legislative findings that: "Parental conflict related to divorce is a societal concern because children suffer potential short-term and long-term detrimental economic, emotional, and educational effects during this difficult period of family transition."<sup>81</sup> Eventually, arguments were made against divorce which were premised upon the parties themselves, not the children. Economically, "women in marriages at or near poverty levels have between a one-third (for Black women) to one-fifth (for Caucasian women) chance of being at or below poverty level after divorce."<sup>82</sup> Furthermore, there is no improvement in the economic condition of these women after five years.<sup>83</sup> Psychologically, "divorced and separated persons have increased risk of suicide, psychopathology, homicide, and death due to illness

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<sup>79</sup> BEYOND RHETORIC, *supra* note 2, at 251.

<sup>80</sup> See 1998 Fla. Sess. Law Serv. 98-403, § 2 (West) ("Just as the family is the foundation of society, the marital relationship is the foundation of the family. Consequently, strengthening marriages can only lead to stronger families, children, and communities, as well as a stronger economy.").

<sup>81</sup> FLA. STAT. ANN. § 61.21(1)(a) (West Supp. 1999).

<sup>82</sup> Steven L. Sayers et al., *Prevention of Marital Dysfunction: Behavioral Approaches and Beyond*, 18 CLINICAL PSYCHOL. REV. 713, 715 (1998). See generally KATHERINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 348-49 (1993).

<sup>83</sup> Sayers et al., *supra* note 82, at 715.

compared with married persons.”<sup>84</sup>

For women and men with greater financial resources, divorce has fewer economic disadvantages and far more “expressive opportunities and freedoms.”<sup>85</sup> Even the emotional trauma of divorce can be viewed as a “temporary and transient condition, marking the first step in the journey toward greater self-awareness and strength.”<sup>86</sup> Women find self-sufficiency through competence, managing money and professional lives. And, “whereas men were once socially pressured to conform to the norms of monogamous marriage and responsible fatherhood, the new freedoms of divorce provided cultural dispensation from these obligations even as post divorce arrangements often made it harder for men to meet these obligations.”<sup>87</sup> These opportunities for individual liberty, be they foreshadowed by adversity for the economically disadvantaged or ability for the select few, the picture is predominantly negative when children are involved. “As family members children cannot act as unfettered individuals pursuing self-interests.”<sup>88</sup> The time before no-fault was a time of greater marital permanence, it was a time when “the obligation to preserve the marriage reflected the deeper understanding that marital stability and child well-being were culturally linked.”<sup>89</sup> In choosing divorce, parents find their goals in conflict with the well-being of their children and efforts to inhibit divorce are efforts to protect children. The National Commission on Children provides research as to the economic and social adjustment of children upon divorce:

Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents. They also suffer more emotional, behavioral, and intellectual problems. They are at greater risk of dropping out of school, alcohol and drug use, adolescent pregnancy and childbearing, juvenile delinquency, mental illness, and suicide . . . . At most ages, problems seem to be more pronounced for sons than for daughters.<sup>90</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> BARBARA WHITEHEAD, *THE DIVORCE CULTURE* 57 (1997).

<sup>86</sup> *Id.* at 60.

<sup>87</sup> *Id.* at 57-58.

<sup>88</sup> *Id.* at 153.

<sup>89</sup> *Id.* at 142.

<sup>90</sup> BEYOND RHETORIC, *supra* note 2, at 253. See generally JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989); Paul R. Amato & Alan Booth, *A Perspective Study of Divorce and Parent-Child Relationships*, 58 J. MARRIAGE & FAM. 356 (1996); Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 SOC. FORCES 895 (1995); Frank F. Furstenberg, Jr., & Julien O. Teitler, *Reconsidering the Effects of Marital Disruption: What Happens to Children of Divorce in Early Adulthood?*, 15 J. FAM. ISSUES 173 (1994); Jean M. Muransky & Darlene De-Marie-Dreblow, *Differences Between High School Students from Intact and Divorced Families*, 23 J. DIVORCE AND REMARRIAGE 187 (1995); Pamela S. Webster et al., *Effects of Childhood Family Background on Adult Marital Quality and Perceived Stability*, 101 AM. J. SOC. 404 (1995).

In America, "the proportion of children under 18 years living with two parents declined from 85 percent in 1970 to 69 percent in 1995."<sup>91</sup> What rose steadily during this same period was the poverty rate among children.<sup>92</sup> Reports cite rising divorce rates and delaying of marriage among adults as two of the major factors. Undoubtedly, protection of children in this post no-fault divorce age ignites efforts to curtail divorce access in America. But not everyone is convinced that the children of divorce are in fact much different from children from intact marriages.<sup>93</sup> One argument is that divorce is better than forcing a child to live in a home where violence is a common denominator to settle family disputes. Statistics state that if a child grows up in a home where violence is practiced, that child is far more likely to commit violence.<sup>94</sup> Yet there is statistical evidence that the type of violence contemplated is present in only ten or fifteen percent of marriages,<sup>95</sup> not sufficient to justify easy access to divorce.

Lack of uniformity of statistical data has not impeded state legislatures from enacting statutes which allow couples to restrict divorce options through marriage covenants freely entered into by themselves at the time of marriage. Legislatures, commentators and academics debate other reform measures. It is arguable that efforts to reform divorce and strengthen marriage for the protection of adults and children result in part from the heightened awareness given to marriage through the debate over the rights of two persons of the same-sex to enter into marriage. At a minimum that debate over same-sex marriage focused attention on the requirements for entering marriage. The debate reawakened marriage by demanding an objective definition of marriage.

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<sup>91</sup> U.S. CENSUS BUREAU, DEMOGRAPHIC STATE OF THE NATION 1997 at 3 (1997).

<sup>92</sup> See Richard W. Stevenson, *Black-White Economic Gap is Narrowing, White House Says*, N.Y. TIMES, Feb. 10, 1998, at A16 ("The combination of strong economy and Government programs like the earned-income tax credit . . . helped push the poverty rate among children down to 20.5 percent in 1996 from 22.7 percent in 1993, following a relatively steady rise that started in 1969."). Additional statistics indicate the vast poverty and its effects upon children. See Raymond C. O'Brien, *An Argument for the Inclusion of Children Without Medicare*, 33 U. LOUISVILLE J. FAM. LAW 567, 606-09 (1995).

<sup>93</sup> The core of the debate over whether to change present no-fault divorce laws centers on the effect that divorce has on children. See, e.g., Deborah L. Rhode, *To Fault or Not to Fault*, NAT'L L.J., May 13, 1996, at A19; Barbara Ehrenreich, *In Defense of Splitting Up*, TIME, Apr. 8, 1996, at 80. Yet, any time a child resides in a single-parent household, the probability of poverty ensuing rises dramatically. See generally James McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987). Psychological problems may ensue, too. See generally Robert Cochran, Jr., & Paul Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327 (1983); COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION (1995).

<sup>94</sup> See, e.g., *Ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982). Some social commentators argue that corporal punishment of children by parents is linked to other types of family violence. See, e.g., Murray A. Stauss & Carrie L. Yodanis, *Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children*, 2 U. CHI. L. SCH. ROUNDTABLE 35, 37 (1995).

<sup>95</sup> See BEYOND RHETORIC, *supra* note 2, at 253. Research shows that 70 percent of divorces occur in what are termed low-conflict marriages. See Tim Swarens, *Securing the Bonds of Marriage*, INDIANAPOLIS STAR, July 31, 1998, at A22 (quoting from PAUL AMATO & ALAN BOOTH, A GENERATION AT RISK (1997)).

C. *Marriage Revisited: The Same-Sex Marriage Debate*

Perhaps because of an innate understanding based upon biblical history and past social contracting, the definition of marriage always seemed a given, something everyone understood. Indeed, many states neglected to offer a definition of marriage, relying on public understanding. The federal government was a moot partner, relying on the federal exception to domestic relations jurisdiction to insulate itself from statutory and common law requirements for marriage.<sup>96</sup> Even in the less formal marriages, common law<sup>97</sup> and putative spouse,<sup>98</sup> a public policy was operative which set the parameters of marriage. If the parties met this minimum definition, then the state was willing to establish and protect their contract with the penumbra of status. This status, which recognized the state's third-party involvement, was protected through doctrines such as the presumption of the validity of the most recent marriage,<sup>99</sup> and marriage by estoppel.<sup>100</sup>

The definition of marriage which was always assumed, involved two persons of the opposite sex.<sup>101</sup> This definition would eventually become codified in state statutes and in the federal Defense of Marriage Act.<sup>102</sup> The Hawaii case of *Baehr v. Lewin*<sup>103</sup> challenged the assumption of opposite-sex marriage and in so doing fostered a national debate over the definition of marriage, the uniqueness of

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<sup>96</sup> The federal exception to domestic relations jurisdiction is based on Congress's exercise of its Article III power under the Constitution, which grants jurisdiction to the federal courts. The federal courts recognize a narrow ban on domestic relations matters involving divorce, alimony and child custody. The most recent ratification of this domestic relations exception to federal jurisdiction is *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

<sup>97</sup> See CLARK, JR., *supra* note 45, at 100-24. The following states allow for common law marriage: Alabama, Colorado, Idaho, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia.

<sup>98</sup> See UNIF. MAR. AND DIV. ACT OF 1970 § 209, 9A U.L.A. 192 (1998) (as amended in 1971 & 1973) (recognizing putative marriage).

<sup>99</sup> See, e.g., *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1980); Peter Swisher & David Jones, *The Last-in-Time Marriage Presumption*, 29 FAM. L.Q. 409 (1995).

<sup>100</sup> See, e.g., *In re Marriage of Recknor*, 138 Cal. App. 3d 539 (Cal. Ct. App. 1982) (holding one of the parties estopped from denying the validity of the marriage).

<sup>101</sup> See *Dean v. District of Columbia*, 18 Fam. L. Rptr. 1387 (D.C. Super. Ct., June 2, 1992), *aff'd*, No. 92-CV-737, 1995 WL 21117 (D.C. Ct. App. Jan 19, 1995); *De Santo v. Bamsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>102</sup> See 1 U.S.C. § 7 (1996).

In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

<sup>103</sup> 852 P.2d 44 (Haw. 1993). After the case was remanded back to the trial court it became *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The court has since declared the controversy moot. See *Baehr v. Miike*, 26 Fam. L. Rep. (BNA) 1075 (Haw. 1999).

marriage, and the impact of marriage upon children.<sup>104</sup> The debate and court action in Hawaii prompted the Hawaii legislature to pass a comprehensive domestic partnership statute providing for reciprocal beneficiaries between partners who would otherwise be unable to marry.<sup>105</sup> The benefits include those previously reserved for married couples: health insurance, inheritance rights, workers compensation benefits, family and funeral leave, and legal standing to petition for wrongful death and victim's rights.<sup>106</sup>

The Hawaii case itself involved two women, Genora Dancel and Ninia Baehr.<sup>107</sup> They were joined by a gay male couple and another lesbian couple.<sup>108</sup> Their argument was that they met all of the requirements of the state of Hawaii for marriage except they were "both of the same sex and for this reason [were] not capable of forming a valid marriage contract within the meaning of [the law]."<sup>109</sup> The plaintiffs argued that the state could not bar them from obtaining a marriage license based on this reason.<sup>110</sup> Specifically, the gay and lesbian couples asserted that the state's denial of same-sex marriage was a violation of the couple's right to privacy as guaranteed by the Hawaii Constitution;<sup>111</sup> second, that the denial of a marriage license was a violation of the right to equal protection and due process of law as guaranteed by the Hawaii Constitution.<sup>112</sup> Interestingly, the Hawaii suit followed what has become a common pattern in recent civil rights litigation: the petition is brought in state courts, based on state constitutional rights rather than federal guarantees.<sup>113</sup>

<sup>104</sup> See, e.g., WILLIAM ESKRIDGE, JR., *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1997); SAME SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997); Richard Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578 (1997); Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 8 (1997).

<sup>105</sup> See 1997 Haw. Sess. Laws 118. Very few persons have registered as reciprocal partners since the law was enacted. See *Hawaii Domestic Partners Law a Bust*, WASH. POST, Dec. 25, 1997, at A14.

<sup>106</sup> See 1997 Haw. Sess. Laws 118.

<sup>107</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>108</sup> See *id.*

<sup>109</sup> *Id.* at 50 n.3. See Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 196-203 (1995); O'Brien, *supra* note 6, at 439-44.

<sup>110</sup> See *Baehr*, 852 P.2d at 50.

<sup>111</sup> See *id.*; see also HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

<sup>112</sup> See *Baehr*, 852 P.2d at 50; see also HAW. CONST. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

<sup>113</sup> See, e.g., *Powell v. Georgia*, 510 S.E.2d 18 (Ga. 1998) (holding that the state constitution's guarantee of the right to privacy voids the state's sodomy statute). "It is a well-recognized principle that a state court is free to interpret its state constitution in any way that does not violate principles of federal law, and

The circuit court denied the plaintiffs' claim,<sup>114</sup> and on appeal the Hawaii Supreme Court reversed, holding that the state must provide a compelling state interest to justify its refusal to provide a same-sex couple with a license to marry.<sup>115</sup> The court's rationale was based on three parts, each of which contributed to both the holding and the debate over the unique status of marriage. First, the court acknowledged that authority to grant licenses to solemnize marriage allows the state to discriminate based on sex in the exercise of the civil right of marriage.<sup>116</sup> This presents an equal protection claim. The Hawaii Constitution provides that: "no person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."<sup>117</sup> This feature, unlike the federal constitution, prohibits state-sanctioned discrimination against any person on the basis of sex.

Second, once the Hawaii court held that awarding a marriage license to opposite sex couples and not same-sex couples was a violation of equal protection, the question arose as to whether such a policy is justified because of the unique definition of marriage. The court did not find that the definition of marriage precluded the equal protection argument,<sup>118</sup> although such a rationale had provided the basis for refusal to award a marriage license in previous cases.<sup>119</sup> The Hawaii court refuted the definition argument with analysis derived from *Loving v. Virginia*.<sup>120</sup>

Like *Baehr*, *Loving* was a marriage case. The facts involved an African-American woman and a Caucasian man who sought to marry in the Commonwealth of Virginia. Denied a marriage license solely because of race, they went to the District of Columbia, where interracial marriage was legal, and were married there. Subsequently, they returned to live in Virginia. Once domiciled in Virginia, the couple was indicted, and convicted of violating Virginia's miscegenation statute which prohibited marriage between a Caucasian and a person of any other race. The Supreme Court of Virginia upheld their conviction and the couple appealed to the

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thereby grant individuals more rights than those provided by the U.S. Constitution." *Id.* at 22 n.3.

<sup>114</sup> See *Baehr*, 852 P.2d at 53.

<sup>115</sup> See *id.* at 64.

<sup>116</sup> See *id.* at 59. Note that the court does not hold that there is a fundamental right for same-sex couples to marry:

[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.

*Id.* at 57.

<sup>117</sup> See HAW. CONST. art. I, § 5.

<sup>118</sup> See *Baehr*, 852 P.2d at 60, n.20.

<sup>119</sup> See *supra* text accompanying notes 96-100.

<sup>120</sup> 388 U.S. 1 (1967).

United States Supreme Court on due process and equal protection grounds.<sup>121</sup> Among other arguments, the state argued the statute was constitutional because the *definition* of marriage did not include a marriage between a Caucasian and a person of any other race. "[I]nterracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural,"<sup>122</sup> and the customs of the state had never included it as a possibility. But the Supreme Court implied that customs could change, indeed, times could change, and the definition of marriage could not bar the issuance of a marriage license to an interracial couple.

The Hawaii court adopted the "times have changed" rationale of *Loving*, including the bar to same-sex marriages presented by natural law or references to the Deity.<sup>123</sup> Thus, if time could allow for interracial couples to marry, time could allow for same-sex couples to marry. The definition of marriage could change with changing circumstances. And once the definition bar was removed, the court was able to progress to the third step in its analysis, requiring the state to provide a compelling state interest to deny the plaintiffs' claim to a marriage license.

Courts are constrained to apply one of three levels of scrutiny: strict, intermediate or rational.<sup>124</sup> The Hawaii Constitution contained an Equal Rights Amendment which, the court reasoned, raised the level of scrutiny involving sex-based classifications under equal protection to the highest level, strict scrutiny.<sup>125</sup> Thus, the state's action in barring the same-sex couples from obtaining a marriage license is presumed to be unconstitutional unless, "the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."<sup>126</sup> To determine if the state could provide a compelling state interest, the case was remanded to the lower court for a hearing.<sup>127</sup>

On December 3, 1996, the circuit court found that the state of Hawaii had failed provide a compelling state interest which would deny persons of the same sex the right to marry in the state.<sup>128</sup> The state had argued many of the elements mentioned before to justify restrictions on divorce: preservation of marriage and insulation from the devastating effects of poverty which often results from a child being raised in a single parent home. Specifically, the state found it compelling to

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<sup>121</sup> See *id.* at 12.

<sup>122</sup> *Baehr*, 852 P.2d at 63 (quoting *Loving*, 388 U.S. at 3).

<sup>123</sup> See *id.* ("[W]e do not believe that trial judges are the ultimate authorities on the subject of Divine Will . . .").

<sup>124</sup> See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1451-66 (1988).

<sup>125</sup> See *Baehr*, 852 P.2d at 67.

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* at 67.

<sup>128</sup> See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). See generally David O. Coolridge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).



“promote the optimal development of children as, all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female.”<sup>129</sup> In rejecting the state’s effort to provide a compelling state interest, the court held: “[The state] has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage.”<sup>130</sup>

The circuit court, having found no compelling state interest, allowed the Supreme Court of Hawaii to order the state to issue marriage licenses to persons of the same sex. The supreme court never did that; the state legislature intervened and submitted a constitutional amendment to the electorate allowing the legislature to prohibit same-sex marriage. This constitutional amendment was approved overwhelmingly by the voters in Hawaii at the November 1998 election.<sup>131</sup> The constitutional amendment halted the eight-year anticipation of the three same-sex couples originating the suit and brought to an end any further consideration of this particular issue by the courts in Hawaii.<sup>132</sup> An Alaska Superior Court judge had also ruled that the state’s marriage laws should withstand strict scrutiny under the Privacy Clause of the Alaska State Constitution,<sup>133</sup> but the Alaska voters negated any review by passing a constitutional amendment of their own rejecting same-sex marriages in the state.<sup>134</sup>

Vermont is the most recent state to visit the issue of marriage benefits. On December 20, 1999, the Vermont Supreme Court held that the Common Benefits Clause of the state constitution demanded that same-sex couples in a committed relationship have access to the same economic benefits as married couples.<sup>135</sup> The court directed the state legislature to enact legislation which would provide for equality of benefits.<sup>136</sup> The issue is, in part, whether a domestic partnership arrangement similar to Hawaii will provide common benefits. Another part is the debate over the essence of marriage and the benefits which derive from it. Similar

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<sup>129</sup> Baehr, 1996 WL 694235, at \*3.

<sup>130</sup> *Id.* at \*21.

<sup>131</sup> See Sam Howe Verhovek, *From Same-Sex Marriages to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1.

<sup>132</sup> See Baehr v. Miike, 26 Fam. L. Rep. (BNA) 1075 (Haw. 1999).

<sup>133</sup> See Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

<sup>134</sup> Alaska and Hawaii voters passed constitutional amendments banning same-sex marriage on the same day. See *State Ballot Limitations: Among Top Ballot Issues Decided Tuesday*, WASH. POST, Nov. 5, 1998, at A46; see also HAW. CONST. art. I, § 23; ALASKA CONST. art. I, § 25.

<sup>135</sup> See Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999). Legislation providing for civil unions between two same-sex persons became effective in Vermont on July 1, 2000. See VT. STAT. ANN. tit. 15, § 1202 (2000).

<sup>136</sup> See *id.*

discussions occur in Canada and France.<sup>137</sup>

Many conclusions may be drawn from the judicial and legislative debate over the right of same-sex adults to marry. It is certain that the debate will continue in spite of constitutional amendments and the passage of both the federal Defense of Marriage Act and the Hawaii reciprocal partners benefit package. The latter, an extensive form of domestic partnership, provides most of the economic benefits of marriage to same-sex couples and arguably, is a precursor to marriage.<sup>138</sup> But a benefits package is not marriage, and proponents of the right of same-sex couples to marry will continue to seek that right. The chief attorney for a major gay and lesbian organization stated the matter succinctly when he said: "What happened in Hawaii was disappointing, but this is a national civil rights movement that will continue, and we have gone from something that didn't exist to something that's being discussed in every corner of the country."<sup>139</sup> It is something which is being discussed in foreign legislatures and courts as well.<sup>140</sup>

No matter which side prevails on the subject of same-sex marriage, everyone will have been involved in a debate over the nature and meaning of marriage. Drawn from a moribund stupor, debate is prompting a national consensus over marriage and what it means. There are those who think the institution should be separated from economic benefits and entitlements and, concurrently,<sup>141</sup> be rejected by gay and lesbian couples. Others argue the contrary:

It is hard to imagine any action more likely to lift the sexual out-law onus than the legalization of same-sex marriage. In one step, society would confer, perforce, the symbolic legitimization of intimacy that is always implicit in the celebration of a marriage. It would be a civic recognition of shared humanity like no other that gay people have ever experienced. But it could only come with marriage.<sup>142</sup>

Because the definition of marriage was at the heart of the Hawaii decision, what is being discussed is the definition of marriage. The same is true in Vermont.

<sup>137</sup> See Steven Pearlstein, *Canada Moves to Give Benefits to Gay Couples*, WASH. POST., Feb. 12, 2000, at A15; Charles Trueheart, *Gay Unions Legalized in France, Unmarried Couples Win Equal Rights*, WASH. POST, Oct. 14, 1999, at A17.

<sup>138</sup> See O'Brien, *supra* note 109, at 218-20. But see O'Brien, *supra* note 6, at 482-84.

<sup>139</sup> See Lisa Keen, *Voters Just Say No*, WASH. BLADE, Nov. 6, 1998, at 27.

<sup>140</sup> See, e.g., Trueheart, *supra* note 137, at A17; Charles Trueheart, *French Right Nixes Unmarried Couples Bill*, WASH. POST, Oct. 10, 1998, at A20; Kai Wright, *French Partners Bill Is Becoming a Political Football*, WASH. BLADE, July 10, 1998, at 10.

<sup>141</sup> See generally, e.g., Paula Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J. L. & POLICY 107 (1996); Steven Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1525 (1993).

<sup>142</sup> Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1783-84 (1998).

The fact that gay and lesbian persons prompt the reawakening of the debate should not obfuscate the issue. The debate is over marriage: "Who decides what is marriage: the people, directly or through their elected representatives, or the courts? What *is* marriage: A contract between autonomous individuals? An intimate, committed relationship? A unique male-female sexual community?"<sup>143</sup> This is the debate which coincides with a restriction in welfare policy and concern over children. It is the debate which prompts a re-evaluation of divorce and no-fault legislation. It is a debate which inspires persons to form covenant marriage communities and eventually, covenant marriage itself. Finally, it is a debate which sponsors of the Florida legislation considered even as they were adopting the Marriage Preparation and Preservation Act. When all is said and done, the Hawaii debate over same-sex marriage contributed immensely to the reform – and hence reawakening – of marriage.

### III. MARRIAGE

#### A. *Covenant Marriage*

It is a fair assertion that covenant marriage developed from a grassroots level. Many of the sponsors are persons primarily associated with evangelical Christian beliefs and practices.<sup>144</sup> Some of the sponsors are lobbyists and some are public policy advocates. For example, the Center for Arizona Policy contributed to draft legislation which was eventually ratified in Arizona,<sup>145</sup> and a group of Christian Legal Society attorneys formed Indiana Attorneys for Covenant Marriage, to sponsor a covenant marriage bill in Indiana.<sup>146</sup> And at the Bethany World Prayer Center in Baton Rouge, Louisiana, the only marriages they perform are covenant marriages<sup>147</sup> – the practice arising from a "message of commitment [which] seems to be slowly percolating through the community."<sup>148</sup>

In essence, covenant marriage allows a couple to voluntarily eliminate the possibility of no-fault divorce in that state which has adopted it. While covenant

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<sup>143</sup> David Ogden Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 210, 238 (1998).

<sup>144</sup> Louisiana State Representative Tony Perkins is a member of Promise Keepers, an evangelical Christian men's group and many persons who spoke in favor of the legislation were members of Christian religious organizations. See *Hearing on House Bill No. 756 Before the Civil Law and Procedure Comm.*, 1997 Reg. Sess. (La. 1997).

<sup>145</sup> See Heather Shulick, *New Law Will Lock Women Into Abusive Marriages, Foes Say*, TUCSON CITIZEN, June 2, 1998, at 1A. Other groups would include: the Institute for American Values, the Georgia Family Council, the Michigan Family Forum, the Minnesota Family Council, American for Divorce Reform, the Indiana Family Institute and the Coalition for Marriage, Family and Couples Education.

<sup>146</sup> See Maureen Hayden, *Indiana Attorneys' Bill for "Covenant Marriage" Falls Short*, EVANSVILLE COURIER & PRESS, Feb. 27, 1999, at C1.

<sup>147</sup> See Christine B. Whelan, *No Honeymoon for Covenant Marriage*, WALL ST. J., Aug. 17, 1998, at A14.

<sup>148</sup> *Id.*

marriage shares a religious basis of commitment, the process adopts the more secular right of an individual to choose a form of marriage less easily dissoluble upon divorce. For example, in Louisiana, a couple can choose to undergo premarital counseling and enter into a type of premarital agreement by which their marriage may only be dissolved upon grounds resembling common law fault.<sup>149</sup> No-fault is not an option in the state for them. In 1997, Louisiana became the first state to allow couples to enter into covenant marriage. Since then bills were considered in Alabama, Alaska, California, Georgia, Indiana, Kansas, Michigan, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington and West Virginia.<sup>150</sup> Each of the legislative efforts to enact the law failed except in one other state, Arizona, where covenant marriage was enacted in 1998.<sup>151</sup>

Louisiana allows for covenant marriage in the context of fault divorce.<sup>152</sup> An innocent party to the marriage may bring an action for divorce only if at least one of the following grounds exists: (1) adultery; (2) commission of a felony and sentence to death or imprisonment at hard labor; (3) abandonment for at least one year; (4) physical or sexual abuse of the spouse or a child of either party; or (5) continuous physical separation of the parties for at least two years; one year separation without reconciliation since entry of a separation judgement unless there are children of the marriage and then the period is extended to eighteen months unless a basis for the separation judgment was abuse of a child.<sup>153</sup> There are reduced requirements if there are no minor children, and, whatever the ground, the couple must undergo counseling before the divorce may be granted.<sup>154</sup> The objective is to make marriage more of a commitment, to encourage the couple to work out difficulties, and to give parties time to think of reasons why they should remain married. Surveys show that most divorced couples wish they had spent more time seeking to work through their difficulties before getting divorced.<sup>155</sup> Thus, even though physical separation for two years could be considered a no-fault ground, the lengthy period of time required would bring about the desired objective.

Once covenant marriage was enacted, Louisiana prepared a pamphlet describing the option for couples considering marriage in the state. Couples already married could "upgrade" their marriage licenses. Obviously there was publicity surrounding the enactment of the legislation, some calling the option a "high-test"

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<sup>149</sup> See LA. REV. STAT. ANN. §§ 9:272-73 (West Supp. 1998).

<sup>150</sup> See Mary Otto, "Save Marriage" Push: Classes, Tougher Laws, SEATTLE TIMES, Mar. 3, 1999, at A9.

<sup>151</sup> See 1998 Ariz. Sess. Laws 135.

<sup>152</sup> See discussion of fault, *supra* Part II.B.

<sup>153</sup> See LA. REV. STAT. ANN. § 9:307 (1998).

<sup>154</sup> See *id.*

<sup>155</sup> See Virginia Norton, *Couples Wish They Persisted; Councils Urge Marriage Prep*, FLA. TIMES-UNION (Jacksonville), July 2, 1998, at B2; Editorial, *If Love Can't Keep Us Together, Laws Won't*, COLUMBIAN, Mar. 5, 1999, at A12.

form of marriage, rather than "regular." Nonetheless, covenant marriage has not been popular; only 3 percent of newlywed couples have chosen covenant marriage.<sup>156</sup> Approximately 500 covenant marriage licenses have been issued, another 600 to married couples, including fifty from out of state.<sup>157</sup> This number is far lower than might have been expected.

One reason why so few couples enter into covenant marriage is opposition from many religious denominations. The Roman Catholic Church does not recognize divorce in any form, allowing annulment of the marriage only under certain circumstances.<sup>158</sup> Thus, to allow a couple to enter into a marriage which could be dissolved on any ground other than death of one of the parties would be contrary to church doctrine.<sup>159</sup> Similarly, Carmen Pate, president of the Washington-based Concerned Women for America, also rejects the proposal, saying that: "All marriages are covenants established by God and we don't have the right to create other categories."<sup>160</sup> Other groups and persons think that the covenants are unenforceable, promote a lifetime commitment but still provide for divorce, and only prolong the inevitable.<sup>161</sup> Others think that such legislation fosters government intrusion into personal marriage vows, and Eleanor Eisenberg, executive director of the Arizona Civil Liberties Union has said that "women and children will find themselves trapped in abusive marriages."<sup>162</sup> Even if the marriage is less than abusive, others argue that: "Couples who stay married merely for the sake of the kids do provide a household with both parents present, but rarely can you consider it an intact family. Ask any kid who grew up in such an environment: The atmosphere is chilling."<sup>163</sup>

At present, no-fault divorce is still available in both Louisiana and Arizona, the two states which have enacted covenant marriage. No-fault in Louisiana is quite liberal, requiring only a six month residency period,<sup>164</sup> and separation for

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<sup>156</sup> See Cheryl Wetzstein, *Erosion of Marriage, Morals Seen in Millennium; Experts Concerned About Social Cost of Family Collapse*, WASH. TIMES, Dec. 27, 1998, at A1. See also Janet McConaughy, *Covenant Marriages Slow-Going in State*, NEW ORLEANS TIMES-PICAYUNE, Oct. 19, 1997, at A4.

<sup>157</sup> See Ed Anderson, *Some Do, More Don't; It'll Catch On, Big Backer Says*, NEW ORLEANS TIMES-PICAYUNE, Aug. 17, 1998, at A1.

<sup>158</sup> See UNITED STATES CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH §§ 1644-50, 1629 (1994).

<sup>159</sup> See Bruce Nolan, *Bishops Back Off Covenant Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997 at A1; see also Anderson, *supra* note 157, at A1 ("Episcopalians, Methodists and Presbyterians also have not endorsed the new law. Baptists and more conservative denominations have.").

<sup>160</sup> Whelan, *supra* note 147, at A14.

<sup>161</sup> See Christine Pfeiffer, Editorial, *Saving Marriages*, INDIANAPOLIS STAR, Nov. 15, 1998, at D3.

<sup>162</sup> Heather Shulick, *New Law Will Lock Women Into Abusive Marriages, Foes Say*, TUCSON CITIZEN, June 2, 1998, at 1A; see also Stephen Dinan, *House Mulls "Covenant Marriage" Option*, WASH. TIMES, Feb. 9, 1999, at C6 (quoting Virginia Poverty Law Center spokesperson); Jennifer Peter, *House Votes Against Proposal to Recognize Covenant Marriage; Proponents of the Legislation Say It Could Decrease the Number of Divorces*, VA.-PILOT & LEDGER-STAR, Feb. 11, 1999, at B4.

<sup>163</sup> Diane Carman, *Marriage Bill Aims to Blame*, DENVER POST, Jan. 23, 1999, at B1.

<sup>164</sup> See LA. CODE CIV. PROC. ANN. art. 10B (West 1998).

six months.<sup>165</sup> Arizona requires domicile for jurisdiction to obtain a divorce and allows for a no-fault divorce upon a showing that the marriage is irretrievable.<sup>166</sup> Couples who have entered into covenant marriage may not take advantage of these no-fault grounds because of their premarital agreement. However, the constitutionality of these statutes has not been tested. At issue is whether the fundamental right to marry encompasses the right to divorce and if so, does a state have the right to limit choices among petitioners.<sup>167</sup> Even the agreement between the marrying partners would not bar the constitutional claim and the debate will most likely center on those who entered into the covenant marriage but are unable to afford a migratory divorce from a nearby state.

A migratory divorce occurs when one party leaves his or her most current domicile and establishes residency in another state with the sole purpose of obtaining a divorce.<sup>168</sup> There are books describing the practice; Nelson Blake's *The Road to Reno: A History of Divorce in the United States* (1962), is an example. Nevada is most often identified as the state to which the migrating party goes seeking a quick and lenient end to the marriage.<sup>169</sup> The practice caused one opinion from the New York Court of Appeals to quip: "Nevada gets no closer to the real public concern with the marriage than Chihuahua."<sup>170</sup> Nevada does allow for divorce based on minimum contact with the state,<sup>171</sup> and if the petitioner meets the minimum time necessary for jurisdiction, there is proper notice to the other party no matter in what

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<sup>165</sup> See LA. CIV. CODE ANN. art. 102 (West 1998).

<sup>166</sup> See ARIZ. REV. STAT. ANN. §§ 25:312, 316 (West 1998).

<sup>167</sup> See generally *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny."). See also *P.O.P.S. v. Gardner*, 998 F.2d 764 (9th Cir. 1993); *Bachr v. Lewin*, 852 P.2d 44 (Haw. 1993) (requiring the state to provide a compelling state interest for denying a marriage license to persons of the same sex); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998); Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998).

<sup>168</sup> The practice results from two Supreme Court decisions holding that a state may alter the marital status of any party domiciled in that state. And if that state had proper domicile according to its own statutory basis, any other state must afford the divorce full faith and credit. See *Williams v. North Carolina* (Williams I), 317 U.S. 287 (1942); *Williams v. North Carolina* (Williams II), 325 U.S. 226 (1945).

<sup>169</sup> Oddly, Las Vegas, Nevada, celebrates more marriages than any other place in the world. In 1997, there were 109,378 marriages in Las Vegas. See Jennifer Barrs, *State of the Union; Americans Seek to Reduce Divorce*, TAMPA TRIB., June 15, 1998, at 1 (quoting the Clark County Recorder's Office).

<sup>170</sup> *Perrin v. Perrin*, 408 F.2d 107, 111 (3d Cir. 1969) (quoting from *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709 (N.Y. 1965), cert. denied., 384 U.S. 971 (1965)).

<sup>171</sup> NEV. REV. STAT. § 125.020(1)(e) (1998) ("Divorce from the bonds of matrimony may be obtained . . . [i]f plaintiff shall have resided six weeks in the state before suit was brought."). Note that the state's trial court sits as a trier of fact as to whether plaintiff was physically present and had the intent to remain in the state for an indefinite period of time. See *Patel v. Patel*, 604 P.2d 816 (Nev. 1980). Nonetheless, even an omission by a petitioner of intent to remain in the state was "not necessarily fatal to jurisdiction with the presence of the physical facts that evidenced such intention." *Boisen v. Boisen*, 451 P.2d 363, 364 (Nev. 1969).

jurisdiction that party resides.<sup>172</sup> If the ground for divorce is met, then the couple is divorced and the divorce must be accorded full faith and credit in other states under article IV, section 1 of the Constitution, but any state asked to accord full faith and credit is afforded the opportunity to review the jurisdiction in the rendering state.<sup>173</sup> If the jurisdiction requirements of the issuing state are met, no matter how slight they may be, full faith and credit is due the divorce.

A couple entering into a covenant marriage in Louisiana or Arizona would be bound by its limited accessibility to divorce in those states. But if one of the parties has the resources to migrate to another state, establish proper jurisdiction and file for divorce under a no-fault ground, the divorce, thus rendered, would be entitled to full faith and credit in Louisiana or Arizona. Indeed, a party to a covenant marriage would be able to obtain a divorce in a foreign country in like manner, but such a divorce would not be entitled to full faith and credit, only comity.<sup>174</sup> While the covenant party may seek an injunction to prevent the other from leaving the state to obtain a divorce in another jurisdiction, no court may interfere with a right to travel and eventual dissolution of the marriage under a ground different from that contemplated under the covenant agreement. A few states have enacted statutory efforts to preclude residents from traveling to another state or foreign country to obtain a divorce and then return to the original jurisdiction seeking full faith and credit. One such statute is the Uniform Divorce Recognition Act,<sup>175</sup> which neither Louisiana nor Arizona has adopted. The statute sets forth parameters of jurisdiction but would only be effective in barring fraudulent migratory divorces if the states which have ordered the migratory divorces adopt it. Then it would restrict the jurisdictional basis of their divorces, allowing for rejection of full faith and credit. Thus, such statutes will only become effective if states with minimum jurisdiction requirements – Nevada, for example – adopt them.

If migratory divorce impedes the effectiveness of covenant marriage, mi-

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<sup>172</sup> Proper notice is essential. *See In re Marconi*, 584 N.W.2d 331, 334 (Iowa 1998).

<sup>173</sup> *See Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

<sup>174</sup> *See, e.g., Carr v. Carr*, 724 So. 2d 937, 940 (Miss. Ct. App. 1998) (allowing for review of divorce decree issued by the Dominican Republic in accordance with jurisdiction requirements, public policy of state, and equities due the parties). *See also Kazin v. Kazin*, 405 A.2d 360, 367 (N.J. 1979) (petition to set aside the foreign divorce must be prompt); *Alabama v. Fulghum*, 699 So.2d 980 (Ala. Crim. App. 1997) (prosecution for bigamy when man married after obtaining invalid foreign divorce).

<sup>175</sup> 9 U.L.A. 26 (1999).

§ 1. Validity of Foreign Decree. A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.

§ 2. Evidence of Domicile. Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

*Id.*

gratory marriage may become its legacy. At present the number of covenant marriages performed in Louisiana is very small.<sup>176</sup> But if the practice became popular, resulting in increased numbers of persons expected to participate in obtaining a covenant marriage, couples resisting the social pressure would be encouraged to exit the state to be married elsewhere. This occurred during the latter part of the 1980s when Louisiana imposed mandatory HIV testing for couples seeking marriage licenses.<sup>177</sup> Illinois also imposed mandatory HIV testing requirements;<sup>178</sup> there was a resulting decrease in applications for marriage licenses in Illinois of 22 percent.<sup>179</sup> In Cook County, where nearly half of the marriage licenses for the state originate, the number of license applications dropped from 1,500 in the first three weeks of January 1987 to 600 in the first three weeks of January 1988, whereas applications increased in border states by 490 percent.<sup>180</sup>

Covenant marriage is not mandatory in either Louisiana or Arizona, but if it becomes the norm, which its sponsors hope it will, the social pressure may prompt many of the citizens to leave the state so as to retain the right to no-fault divorce and avoid the statutory expectations. Citizens wanting to reject the social obligation of covenant marriage at the start may be forced into marriage in another jurisdiction. Neither option seems beneficial to the state nor to its citizens. The best assessment of covenant marriage may be this: "Covenant marriage is good public relations but bad public policy."<sup>181</sup> Providing couples with a means by which they may force themselves into a protracted but not committed relationship is at best misleading; at worst, misdirected. "Covenant marriage is not a new approach to the problem; it is merely the ghost of a system that was declared dead three decades ago."<sup>182</sup>

#### B. *Voluntary Marriage Preparation*

While covenant marriage provides an option for a couple to make divorce more difficult so as to allow for more time to work out difficulties, voluntary marriage preparation seeks to prepare a couple before entering into marriage. The sug-

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<sup>176</sup> See McConnaughey, *supra* note 156, at A4.

<sup>177</sup> See LA. REV. STAT. ANN. §§ 9:241, 241(A) (West 1998). Texas also passed a statute mandating HIV testing when HIV prevalence reached a designated point. See TEXAS FAM. CODE ANN. § 4419b (West 1987); Ill. Ann. Stat. Ch. 40, para. 204 (Smith-Hurd 1987).

<sup>178</sup> See 40 ILL. COMP. STAT. ANN. ¶ 204 (West 1987).

<sup>179</sup> See Michael Closten et al., *Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic*, 69 TUL. L. REV. 71, 97 (1994).

<sup>180</sup> See *id.* at 97-98; see also Cheryl Devall, *Repeal Marriage AIDS Test Law, Health Officials Urge*, CHICAGO TRIB., Mar. 21, 1988, at 2 (stating that the total number of marriage license applications for January 1987 was 3,250 and dropped to 2,613 in January 1988).

<sup>181</sup> Amy L. Stewart, Note, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 536 (1999).

<sup>182</sup> *Id.* at 535. See also Kristine M. Holmgren, *Holy History Teaches a Simple Truth: You Can't Legislate Covenant*, STAR-TRIB. (Minneapolis-St. Paul), Mar. 18, 1999, at 19A.



gested reform effort is meant to address the complaints of domestic relations attorneys and sociologists, some of whom complain that returning to traditional fault grounds for divorce is working on the wrong end of marriage.<sup>183</sup> Admittedly, enacted covenant marriage statutes have a provision requiring premarital counseling, but the impetus of those statutes is elimination of no-fault as a basis for divorce.<sup>184</sup> The intent behind voluntary marriage preparation is to better equip people for marriage.

Any appraisal of marriage preparation begins with the premise that voluntary programs of premarital counseling have existed for extended periods. Barbara Dafoe Whitehead describes at length the pioneer efforts of Earnest R. Groves to combine traditional morality with human psychology so as to develop a more scientific approach to marriage and marital problems.<sup>185</sup> Couples themselves are free to go to counseling and seek advice and support from family and friends. Indeed, arranged marriages, now more prevalent in the United States as a result of immigration, are a form of marriage preparation: the culture, religion and family of the couple have strong beliefs about the role of marriage, the role of the individuals and the social obligations flowing from the status. Assuredly, these beliefs have been taught from birth.

As with legislative efforts associated with covenant marriage, Protestant evangelical pastors have been instrumental in developing new programs of marriage counseling.<sup>186</sup> Syndicated columnist Michael McManus and his wife advocate a program called Community Covenant Marriage.<sup>187</sup> After they met with clergy in Culpeper, Virginia, that city became the one hundredth in the country to adopt a community marriage policy.<sup>188</sup> Cities in thirty-five states are participating in similar programs.<sup>189</sup> Being a part of the program does not require any state action, only that

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See Laura Gatland, *Putting the Blame on No-Fault*, A.B.A. J., Apr. 1997, at 50 (quoting attorney Lynne Gold-Bikin: "If you want marriages to work, you have to work before people make their choices"). In connection with passage of the Florida Marriage Preparation and Preservation Act, the legislature found that, "Parents who are separating or divorcing are more likely to receive maximum benefit from [programs] if they attend such program[s] at the earliest stages of their dispute, before extensive litigation occurs and adversarial positions are assumed or intensified." FLA. STAT. ANN. § 61.21(1)(d) (West Supp. 1999).

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Couples attending the counseling could pay a reduced marriage license application fee or be allowed to waive the waiting period if one is imposed. See Suzanne McBride, *Lawmakers Mull Proposals on Marriage; Premarital Counseling, Covenant License Aimed at Keeping More Couples out of Divorce Court*, INDIANAPOLIS STAR, Sept. 10, 1998, at B1.

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See WHITEHEAD, *supra* note 85, at 39-42.

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See, e.g., Ervin Dyer, *18 Churches Join in Premarital Class Covenant*, PITTSBURGH POST-GAZETTE, March 18, 1999, at C1; Ben Steelman, *Entering a Covenant; Many Pastors, Rabbis Offer Counseling*, SUNDAY STAR-NEWS (Wilmington, N.C.), Jan. 31, 1999, at 14; Paula Story, *18 Churches' Leaders Agree: No Counseling, No Wedding*, SUNDAY PATRIOT-NEWS (Harrisburg, Pa.), March 21, 1999, at B6; Katie Wang, *Clergy Aim At Building Better Marriages; More Churches Want Couples to Have Counseling Before They Say "I Do,"* ALLENTOWN MORNING CALL, March 7, 1999, at A1.

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See Richard C. Dujardin, *Churches Urged to Work Harder to Save Marriages*, SUN-SENTINEL (Ft. Lauderdale), Feb. 27, 1999, at D10.

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See *id.*

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See *id.*

churches participating require couples seeking to marry to undergo at least four months of marriage preparation, which would include retreats and classes offered by other married couples on how to build a successful marriage.<sup>190</sup> The hope is that couples would then turn to the advice they received or to other church programs after marriage, to resolve conflicts and strengthen the relationship.<sup>191</sup>

Secular advocates of better and more durable marriage also advocate marriage preparation programs. Diane Sollee, head of the Coalition for Marriage, Family and Couple Education in Washington, D.C., calls such programs "driver ed for marriage."<sup>192</sup> Lucy Kizirian, a marriage and family therapist identifies the particulars: "[Couples] haven't been taught how to fight fair, how to get along with their in-laws, how to manage a budget. Moreover . . . they don't understand that marriages don't stay romantic forever."<sup>193</sup> Abigail Stewart, one of five authors of *Separating Together: How Divorce Transforms Families*, writes that society needs to articulate what we expect from people when they get married.<sup>194</sup> These persons and others advocate a preparation program which can compete with messages received from a culture which some see as promoting divorce. For example, Barbara Dafoe Whitehead describes what she terms the "culture of divorce":

With each passing year, the culture of divorce becomes more deeply entrenched. American children are routinely schooled in divorce . . . Family movies and videos for children feature divorced families. *Mrs. Doubtfire*, originally a children's book about divorce and then a hit movie, is aggressively marketed as a holiday video for kids. Of course, these books and movies are designed to help children deal with the social reality and psychological trauma of divorce. But they also carry an unmistakable message about the impermanence and unreliability of family bonds. Like romantic love, the children's storybooks say, family love comes and goes. Daddies disappear. Mommies find new boyfriends. Mommies' boyfriends leave. Grandparents go away. Even pets must be left behind.<sup>195</sup>

Even though the impetus for the program of voluntary marriage preparation came from religiously motivated persons, the responsibility has spread to civic and political leaders. Discussion usually begins with the merits of covenant marriage and progresses to covenant programs. Legislation to enact covenant marriage

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190 See *id.*

191 See *id.*

192 See *States Ponder Ways to Fortify Matrimony; Proposals Have Included "Drivers Ed" for Marriage, Repeal of No-Fault Divorce*, BALTIMORE SUN, Feb. 14, 1999, at 4A.

193 Barrs, *supra* note 169, at 1.

194 See *id.*

195 WHITEHEAD, *supra* note 85, at 11.

was introduced in seventeen states in 1998, and Pam Greenberg from the National Conference of State Legislatures said that other bills have been introduced to provide for counseling prior to marriage or divorce, parenting education, and repeal of no-fault divorce.<sup>196</sup> In Grand Rapids, Michigan, a steering committee composed of college presidents, attorneys, business owners, clerics, a local mayor, and a judge initiated a community covenant program which included the following: (1) encourage a courtship for at least a year; (2) promote chastity outside of marriage and fidelity in the marital relationship; (3) train mature married couples to serve as mentors to those who are engaged, newlyweds or experiencing marital difficulties; (4) cooperate with other congregations and organizations to share resources and to create a positive climate in which all marriages are helped to succeed; (5) examine within professions ways current policies and practices may unwittingly undermine marriage; (6) promote a workplace environment which will effectively support marriages and families, and (7) volunteer time, expertise, influence and resources to support initiatives which promote marriage and stable families.<sup>197</sup>

Statistics indicate that communities which provide community covenant programs to couples experience a reduction in divorce.<sup>198</sup> The chairperson of the Wisconsin group, Eau Claire, reported that divorce filings dropped from 398 in 1995 to 366 in 1996 and 341 in 1997.<sup>199</sup> Michael McManus, the originator of the program, reports that the divorce rate in Modesto, California, the first of the covenant cities, has since 1986 witnessed a drop of thirty-five percent in the number of divorces.<sup>200</sup> Other cities have seen declines of between five and fifteen percent.<sup>201</sup> The reason for the decline could be a result of many factors, but any shift in attitude is an incentive for members of the community covenant program.

This shift in attitude is a major one. Commenting on the past gradual decline of efforts to strengthen marriages, Barbara Dafoe Whitehead writes: "[T]he effort to strengthen and preserve marriage has been all but abandoned in recent years, either as a commitment by parents unhappy in their marriages or as a goal for family professionals."<sup>202</sup> While noting the lack of professional opportunities for persons to learn or develop skills for preserving marriage relationships, the question arises as to whether such programs have any effect. At first glance, the answer

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<sup>196</sup> See Otto, *supra* note 150, at A9.

<sup>197</sup> See Roger Sider, Commentary, *Civic Commitment to Sustain the Vows*, WASH. TIMES, July 8, 1998, at A16.

<sup>198</sup> See Susan Wetzel, *Marriage Preparation is a Worthy Goal*, GREENSBORO NEWS AND REC., Aug. 22, 1998, at B6.

<sup>199</sup> See Tom Heinen, *Fond du Lac Clergy Join Movement for Marriage Guidelines; Community Covenant to Cut Divorce Rate Signed by 20 Church Leaders*, MILWAUKEE J. SENTINEL, Sept. 19, 1998, at 1.

<sup>200</sup> See *id.*

<sup>201</sup> See David Waters, *Dyer Clergy Commit to Make "Till Death Do You Part" Reality*, COMM. APPEAL (Memphis), Sept. 28, 1998, at A1.

<sup>202</sup> WHITEHEAD, *supra* note 85, at 190. See also Sayers et al., *supra* note 82, at 713 (reporting that programs have begun in earnest only in the last two decades). See generally PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (D. Popenoe et al. eds., 1996).

would appear negative as the number of Roman Catholics divorcing is similar to the rest of the population. The Catholic church has long required each couple entering into marriage to attend some sort of program or counseling session prior to marriage. This may be a one-day session conducted by a priest or trained married couples, or an engaged encounter weekend where the couple is expected to focus on an inventory of issues such as finances, communications, religion and intimacy.<sup>203</sup> In addition, there are extensive inventory tests which the priest may administer to the couple, then discuss the results.<sup>204</sup> There is also the dogma of the faith which teaches that marriage is a sacrament,<sup>205</sup> and this reinforcement is constant in church attendance. However, sponsors claim the program is far too short and societal pressures too ingrained to be positively affected by church programs:

Even if sheer numbers do not ratify the effectiveness of premarital counseling, there is sufficient evidence of what programs and models seem to have the best effect. Recent articles on the subject report that: "Marriage-education professionals have made progress over the past two decades in understanding the needs of premarital couples and addressing those needs more effectively."<sup>206</sup> Interactive programs are recommended, and structured discussion in small groups "appears to promote enhanced awareness, communication skills, and mutual support among couples involved."<sup>207</sup> The emphasis should be upon skills: financial management, gender roles, leisure, sex, parenting, communications or conflict resolution.<sup>208</sup> Yet any study offering an appraisal of premarital programs must begin with the fact that those most likely to voluntarily participate are those "who are probably better adjusted to begin with."<sup>209</sup> Researchers indicate that an effort must be made to include those at greater risk: "those from lower income homes, with adverse family climates, with lower levels of religiosity, with less optimism about marriage, who are younger in age and possibly emotional maturity, and who may not report that preparation for marriage is all that important."<sup>210</sup>

Having noted progress among professionals in developing programs to address skills associated with better relationships, studies are guarded in assessing

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<sup>203</sup> See Steelman, *supra* note 186, at 14; Wang, *supra* note 186, at A1. A rejected Wisconsin proposal would have allowed the county to notify clergy who married the couple when the county received a petition for divorce. The supposition being that the cleric could intervene to save the marriage. See Lori Holly, *County to Give Couples Marriage Tips; Those Who Obtain Licenses Will Get Pamphlet as Part of Effort to Reduce Divorce Rate*, MILWAUKEE J. SENTINEL, Jan. 29, 1999, at 1.

<sup>204</sup> See Steelman, *supra* note 186, at 14.

<sup>205</sup> See *id.*

<sup>206</sup> Benjamin Silliman & Walter R. Schumm, *Improving Practice in Marriage Preparation*, 25 J. SEX & MARITAL THERAPY 23, 38 (1999).

<sup>207</sup> *Id.* at 29.

<sup>208</sup> See *id.* at 36.

<sup>209</sup> Benjamin Silliman & Walter R. Schumm, *Client Interests in Premarital Counseling: A Further Analysis*, 21 J. SEX & MARITAL THERAPY 43, 53 (1995).

<sup>210</sup> *Id.*

any progress made in preventing marital discord. For example, "[O]n the more important issue of demonstrating that preventive interventions can help maintain relationship adjustment and enhance stability, the evidence remains quite weak."<sup>211</sup> Researchers at the University of California, Los Angeles, report the findings of two studies indicating that, "even couples who are most likely to benefit from [premarital] programs may not actually experience better marital outcomes."<sup>212</sup> But then again, they may: "it is quite likely that some of the couples in these studies participated in highly effective premarital programs."<sup>213</sup> Consistently, the conclusion is that present studies were limited and more data, more participation and more program models need to be developed.<sup>214</sup>

Churches and other religious congregations occupy a pivotal role in marriage preparation. "A much higher percentage of couples may be reached with this approach, and there is potential for standardizing interventions in these settings and for collecting follow-up data to evaluate the impact of their prevention programs."<sup>215</sup> If the delivery of marriage preparation programs were broadened to take advantage of the programs offered by churches, important insights would be gained to assist couples.<sup>216</sup> The means by which this would be broadened would be to require couples to undergo marriage preparation prior to obtaining a marriage license. The state may offer secular preparation, but the churches would have the opportunity to evangelize in consort with the free exercise rights of the couple. Furthermore, data compiled by the state on divorce could be made available to the religious denominations as feedback. The interaction between the presently voluntary programs being conducted by many private organizations would work well in tandem with public policy considerations and resources. With this goal in mind, on January 1, 1999, Florida began a comprehensive program of mandatory marriage preparation.

### C. *Florida: Mandatory Marriage Preparation*

Florida was the first state in the nation to enact a comprehensive plan for strengthening marital relationships. The statute became effective in 1999 and is known as the Marriage Preparation and Preservation Act of 1998.<sup>217</sup> Among the

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<sup>211</sup> Sayers et al., *supra* note 82, at 739.

<sup>212</sup> Kieran T. Sullivan & Thomas N. Bradbury, *Are Premarital Prevention Programs Reaching Couples at Risk for Marital Dysfunction?*, 65 J. CONSULTING AND CLINICAL PSYCHOL. 24, 29 (1997).

<sup>213</sup> *Id.*

<sup>214</sup> *See id.*

<sup>215</sup> *Id.* at 29-30.

<sup>216</sup> *See* Sayers et al., *supra* note 82, at 739-40.

<sup>217</sup> 1998 Fla. Sess Law Serv. 98-403 (West) (codified in scattered sections of FLA. STAT. ANN. (West Supp. 1999)). Monetary support for the provisions of the act will come from fees associated with issuance of a marriage license for those not taking the premarital preparation course, and from any fees associated with filing for divorce. The fees will be placed in the Family Courts Trust Fund. *See* FLA. STAT. ANN. §§ 741.01(4), 28.101(1)(d)1 & 2 (West Supp. 1999). Also, \$75,000 was appropriated to the Florida State Uni-

things the statute does not do is alter the no-fault divorce regime in Florida, nor does it enact a covenant marriage option for state citizens. Divorce remains an option as before: Upon a finding of six months residency to establish jurisdiction, a couple may file for a divorce based on irretrievable breakdown, and if there are children, the court may order counseling or continue the proceeding for another three months to enable the parties to seek reconciliation.<sup>218</sup> Other procedures are now in place which would assist, but the parties still have the ability to enter into marriage with minimal differences from prior to the act.

Publicity surrounding the act implied that getting a divorce was too easy. Commentators compared the hassle of getting a driver's license with the ease with which one could get a divorce.<sup>219</sup> Statistics exceeded the nationwide pattern of fifty percent of marriages ending in divorce: 149,941 Floridians got married in 1996; 80,218 got divorced.<sup>220</sup> There is also a growing movement among state citizens towards voluntary marriage preparation and support and giving couples time to work out their difficulties. This is the complaint over no-fault divorce: it allows no time for the couple to settle disputes between themselves. The emphasis in the new Florida legislation is upon learning relationship skills and then applying them to the workplace, schools, neighborhoods and to better marriages. The statute proclaims that "[t]he state has a compelling interest in educating its citizens with regard to marriage and, if contemplated, the effects of divorce."<sup>221</sup>

Specific elements of the education program include the following: First, students in high school will be required to take a course in marriage and relationship skills. Starting at the high school level adopts the thinking of persons such as Dianne Sollee, leader of the Coalition for Marriage, Family and Couples Education, that marriage is skill-based and "any fool can learn."<sup>222</sup> This is the premise of the marriage preparation programs as well. Florida intends to begin the process earlier, at high school.

Second, the fee charged for each marriage license issued in the state will be reduced by a sum of \$32.50 for all couples who obtain a certificate of attendance from a qualified course provider for a course taken no more than one year prior to the date of the application for a marriage license.<sup>223</sup> The course must be at least four

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versity Center for Marriage and Family "for review of premarital preparation courses, development of premarital preparation pilot programs, and development of a questionnaire and creation of a curriculum based on data collected by its researchers." 1998 Fla. Sess. Law Serv. 98-403, § 16.

<sup>218</sup> See FLA. STAT. ANN. §§ 61.021, 61.052 (West Supp. 1999). Florida does not grant divorce based upon fault of either of the parties.

<sup>219</sup> See, e.g., Barrs, *supra* note 169, at 1.

<sup>220</sup> See *id.*

<sup>221</sup> 1998 Fla. Sess. Law Serv. 98-403, § 2(9). Legislation has been introduced in California seeking to educate couples about the responsibilities of marriage. See *Think First, Then Wed*, L.A. TIMES, June 2, 1999, at B6.

<sup>222</sup> Cheryl Wetzstein, *Marriage Helps Jobs, Families, Panel Says*, WASH. TIMES, July 2, 1998, at A10.

<sup>223</sup> See FLA. STAT. ANN. § 741.01(5) (West Supp. 1999).

hours and may be completed by personal instruction, videotape, instruction via other electronic medium, or a combination of these methods.<sup>224</sup> The topics may include conflict management, communication skills, financial responsibilities, parenting responsibilities and analysis of personal data pertinent to the couple being married.<sup>225</sup> Course providers may come from a list of professional persons, including psychologists, clinical social workers, marriage and family therapists, mental health counselors, and officials of a recognized religious institution.<sup>226</sup> Course providers must register with the clerk of the circuit court and obtain a license number, or, if a member of a religious organization, a statement as to relevant training.<sup>227</sup> The cost of the premarital program will be paid by the parties themselves,<sup>228</sup> so any reduction in the fee paid to obtain a marriage license will be offset by the cost of the course.

Third, all premarital preparation courses offered and completed by individuals will be reviewed by researchers from the Florida State University Center for Marriage and Family.<sup>229</sup> An effort will be made to determine which programs and techniques work best, and pilot programs will be developed based on the results.<sup>230</sup> Because the state will have access to divorce data which take place in Florida, statistics and observations can be obtained as to the effectiveness of preparation programs.

Fourth, the state requests the Family Law Section of the Florida Bar to create a handbook which would explain the rights and responsibilities under Florida law of marital partners to each other and to their children, both during marriage and upon dissolution.<sup>231</sup> When a couple applies for a marriage license, the handbook would be provided.<sup>232</sup> Within the handbook would be information concerning prenuptial agreements, shared parental responsibility for children, child support, property rights, domestic violence and abuse of children, and community resources available for separating or divorcing persons and their children.<sup>233</sup> Women's rights will be specified in the Battered Women's Bill of Rights.<sup>234</sup> The clerk may also make the information available on videotape or other electronic media and will provide a list of providers and sites at which marriage preparation courses can be

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<sup>224</sup> See *id.* § 741.0305(1).

<sup>225</sup> See *id.* § 741.0305(2).

<sup>226</sup> See *id.* § 741.0305(3)(a).

<sup>227</sup> See *id.* § 741.0305(5).

<sup>228</sup> See FLA. STAT. ANN. § 741.0305(3)(b).

<sup>229</sup> See *id.* § 741.03055(1).

<sup>230</sup> See *id.* § 741.03055(2).

<sup>231</sup> See *id.* § 741.0306(1).

<sup>232</sup> See *id.* § 741.0306(2).

<sup>233</sup> See FLA. STAT. ANN. § 741.0306(3).

<sup>234</sup> See *id.* § 741.0306(3)(k).

obtained.<sup>235</sup>

Fifth, before a marriage license may be issued to a couple wishing to marry, the couple must first sign a statement which specifies whether the parties, separately or together, have completed a premarital preparation course.<sup>236</sup> The statement must also specify whether the couple has obtained and read or otherwise accessed the information obtained in the family law handbook or other electronic media presentation.<sup>237</sup> As an incentive for the couple to complete the premarital preparation course, the effective date of the marriage license will not be delayed if the couple has completed the course; if the course is not completed, the couple must wait three days before the marriage license will be effective.<sup>238</sup>

Sixth, the Florida State University Center for Marriage and Family may prepare a questionnaire for distribution to all prospective married couples. Any applicant for marriage may complete and file with the clerk of the circuit court an unsigned anonymous informational questionnaire.<sup>239</sup> Responses will be kept in a separate file and used for research.<sup>240</sup> Likewise, whenever a couple files for divorce or dissolution of their marriage, the Florida State University Center for Marriage and Family will provide a questionnaire to be completed by the couple.<sup>241</sup> In this instance, however, completion of the questionnaire is not voluntary, the petitioner must complete the questionnaire and the responses will then be kept in a separate file and made available for research.<sup>242</sup>

Finally, when a couple has filed for divorce and there is proper jurisdiction, the court may grant the divorce on the statutory no-fault ground.<sup>243</sup> If there are no minor children, the divorce may be granted upon the court's finding that the marriage is, in fact, irretrievably broken.<sup>244</sup> However, if there are minor children of the marriage, the court may order the couple to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi, or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consulta-

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<sup>235</sup> See *id.* § 741.0306(2).

<sup>236</sup> See *id.* § 741.04(2)(a).

<sup>237</sup> See *id.* § 741.04(2)(b).

<sup>238</sup> See FLA. STAT. ANN. § 741.04(3). The statute does allow exceptions to the three-day period of delay before marriage may be effective. These exceptions will be granted to non-Florida residents seeking a marriage license from the state and for individuals asserting hardship. Marriage license fee waivers will continue to be available to all eligible individuals and for state residents. A county court judge may waive the delayed date for good cause. See *id.*

<sup>239</sup> See *id.* § 741.03056(1).

<sup>240</sup> See *id.*

<sup>241</sup> See *id.* § 61.043(2).

<sup>242</sup> See *id.*

<sup>243</sup> See FLA. STAT. ANN. § 61.052(2).

<sup>244</sup> See *id.* § 61.052(2)(a).



tion.<sup>245</sup> The process of consultation may continue the marriage no longer than three months, and if at any time during the consultation process the court finds that the marriage is irretrievably broken, the court may grant the petition for the divorce.<sup>246</sup> Furthermore, when there are minor children, courts may mandate participation in the Parent Education and Family Stabilization Course, a program designed to educate, train, and assist divorcing parents in regards to the consequences of divorce on parents and children.<sup>247</sup> For good cause, a court may excuse a party from attending, and the court will establish a registry of course providers and sites at which the Parent Education and Family Stabilization Course requirement may be completed.<sup>248</sup> And even though a fee may be required to attend, the court may provide at least one site where the fee will be on a sliding scale for those unable to pay.<sup>249</sup> Statements made or information obtained at the sessions may not be used in conjunction with any pending adjudication or become part of the record of the case.<sup>250</sup> Also, the couple need not take the course together.<sup>251</sup> And for enforcement, the court may deny parental responsibility or visitation or hold both or either of the parties in contempt for failure to take the course.<sup>252</sup>

The Florida legislation is important because the state seeks to set mandatory standards for marriage and divorce that go beyond assumptions complementing marriage formalities and divorce grounds. Formalities and grounds have long been associated with the state's ability to set the rules of marriage.<sup>253</sup> But following the period of expanded individual liberties during the 1960s and 1970s, the state responded to the individuality of the contracts between the parties and eschewed rules and domination. No-fault divorce resulted. The pattern once set, "[I]f the state is now in the process of divesting itself of its marriage regulation business, then, of course, it is not likely to set up shop as an enforcer to heretofore unenforceable contracts."<sup>254</sup> Today, Florida's new legislation is the first major step by a state to reestablish marriage regulations. Seen either as societal justification or as societal tyranny, the step is significant because the state is challenging the individual liberty

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<sup>245</sup> See *id.* § 61.052(2)(b)(1).

<sup>246</sup> See *id.* § 61.052(2)(b)(2).

<sup>247</sup> See *id.* § 61.21(2).

<sup>248</sup> See FLA. STAT. ANN. §§ 61.21(3), (6).

<sup>249</sup> See *id.* § 61.21(6).

<sup>250</sup> See *id.* § 61.21(8).

<sup>251</sup> See *id.* § 61.21(10).

<sup>252</sup> See *id.* § 61.21(9).

<sup>253</sup> See generally, *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878); *Maynard v. Hill*, 125 U.S. 190 (1888); *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985). But see Lenore Weitzman, *Legal Regulation of Marriage: Tradition and Change, A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CAL. L. REV. 1169 (1974) (asserting that individual needs replace the needs of the state to regulate marriage).

<sup>254</sup> Glendon, *supra* note 47, at 666.

of the couple in making its own rules in regards to marriage. This is significant because it reverses a well-established trend.

The Florida legislation is a move towards greater state involvement in the individual lives of married partners, albeit at the behest of concern for child welfare and sometimes, the couple's own well-being. It goes beyond distributing pamphlets to couples who obtain a marriage license,<sup>255</sup> or allowing couples to privately adopt a covenant marriage. It does not raise the requirements to enter into marriage.<sup>256</sup> Instead, it mandates programs which the state thinks important to a functioning relationship. The state is asserting itself as a player in the status of marriage.

Other states, such as Indiana, are considering adoption of the Florida legislation. In Indiana, however, lawmakers are considering making the features which Florida allows as discretionary to become mandatory. For example, requiring that all couples complete a marriage preparation or counseling program.<sup>257</sup> Florida only provides a modest financial incentive. If legislatures in the seventeen states which considered passing covenant marriage during 1998 terms review the possibility of Florida's example, further debate and possible legislation will follow. The extent to which the state becomes involved in marriage preparation will, at a minimum, affect consensus as to the definition of family and a reawakening of marriage. The state's return to an objective standard of marriage, particularly one which may be influenced by religious preparation will lessen the individuality of the marriage contract and reawaken the objective distinctiveness of marriage.

Steven Nock, a sociologist at the University of Virginia, thinks that "[s]ome type of divorce reform will probably exist in almost every state in the next 10 to 15 years."<sup>258</sup> There is a growing concern over the number of divorces among more conservative persons who seek to restore a sense of family and commitment. As one author has written: "The idealized family has become the panacea for all social ills in contemporary policy discussions."<sup>259</sup> The resulting debate prompts popular slogans and rhetoric which then become legislative initiatives. One of the primary incentives, according to Nock, is the state welfare costs associated with divorce. Nock estimates that, "for every three or four divorces, one family ends up

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<sup>255</sup> See Holly, *supra* note 203, at 1.

<sup>256</sup> Maryland, for example, in response to a marriage between a pregnant 13-year-old girl and a 29-year-old man, raised the minimum age of marriage during its 1999 legislative session. See 1999 Md. Laws 231 (amending MD. CODE ANN. FAM. LAW § 2-301); Tanya Jones, *Miller Seeks Sex Charges in Marriage of Girl, 13; Calling 29 Year-Old Man A Predator*, BALTIMORE SUN, Oct. 3, 1998, at 2B.

<sup>257</sup> See Suzanne McBride, *Proposal Would Urge Couples to Look Before Leaping*, INDIANAPOLIS STAR, Aug. 13, 1998, at A1; see generally SCOTT STANLEY & HOWARD MARKMAN, CAN GOVERNMENT RESCUE MARRIAGES? (1997) (arguing that there are negative effects of having government involved in promoting values and private lives).

<sup>258</sup> Otto, *supra* note 150, at A9.

<sup>259</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2195 (1995). The author argues that the traditional definition of family must be less form oriented and more developmental in the context of function. At present, the form definition forces women into subservient roles, deprives them of financial resources, and subjects them to stigma. The sooner society adjusts to the changing definition of family, the better will be public policy response. See *id.* at 2184-86.

on welfare.<sup>260</sup> Even with child support collections up from \$12 billion in 1996 to \$14.4 billion in 1998,<sup>261</sup> children are often the financial victims of divorce. Adults too are victims of the economic costs associated with divorce.

When Congress passed the Personal Responsibility & Work Opportunity Reconciliation Act of 1996 (PRWORA), states were given block grants with which they could wean welfare recipients from welfare to work. The new rules allow for child care, housing grants, transportation grants and housing vouchers. But the federal legislation also impacts the definition of family and family responsibility. Additionally, because the grants are not open-ended entitlements, states are confronted with a finite amount of dollars and the need to make people responsible for each other. States have been very successful in reducing the number of welfare recipients from their roles and indications are that many of the former welfare recipients are employed.<sup>262</sup> The Florida legislation works tangentially with the new federal legislation. That is, if states are called upon to support increasing numbers of children who are the victims of poverty because of a hasty marriage or divorce, attention to greater education as to the responsibilities of marriage will follow. A successful marriage lessens the chances of a child and adult being poor. Poverty prompts state support of marriage preparation. In doing so however, the state is working in tandem with the new federal welfare legislation to define family as a form family constituted by marriage. Choosing the definition of family is significant.

#### IV. REAWAKENING: PRWORA AND THE DEFINITION OF FAMILY

Poverty is an elusive concept to define. Nonetheless, virtually all of the commentators on the subject of divorce and poverty agree that the chances for a child to be at or below the poverty level are greatly enhanced if the parents divorce and the child remains in a single parent household.<sup>263</sup> Furthermore, women who divorce and do not remarry are far more likely to be poor than men who divorce.<sup>264</sup> Marriage allows for combined income, a reduction in income production loss possibilities, and a mediation of any gender bias.<sup>265</sup> The trend towards this unity of earning power is evidenced in the statistics: in 1990, in approximately 70 percent of

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<sup>260</sup> Otto, *supra* note 150, at A9.

<sup>261</sup> See Havemann, *supra* note 17, at A27.

<sup>262</sup> See Al Kamen, *Clinton Touts Decline in Welfare Rolls, New Rules for States*, WASH. POST, Apr. 11, 1999, at A7.

<sup>263</sup> See BEYOND RHETORIC, *supra* note 2, at 83.

<sup>264</sup> See Lynne M. Casper et al., *The Gender-Poverty Gap: What We Can Learn From Other Countries*, 59 AM. SOC. REV. 594, 598 (1994) (reporting that recent studies indicate that American women are forty-one percent more likely to live in poverty than American men).

<sup>265</sup> See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); SUSAN MOLLER ORKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

two-parent families with children, both parents worked.<sup>266</sup> Thus, if divorce creates a class of persons with a significant chance of falling below the poverty level, then divorce prevention becomes a compelling state interest.<sup>267</sup> This is the rationale behind covenant marriage, initiatives to curtail no-fault divorce, and Florida's Marriage Preparation and Preservation Act.

If the state has a compelling state interest to curtail poverty through preserving marriage, does the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) contribute to the urgency of the task? The answer will depend on the effect which the Act has upon the ability of any newly divorced woman to support herself and her children. Obviously, a woman with adequate resources, either because of economic self-sufficiency or full and fair support payments will not be affected by the Act's provisions. But women without such resources are at risk.<sup>268</sup> They are at risk because the Act will terminate support payments unless they can achieve self-sufficiency through employment. While the Act creates substantial mechanisms for collection of child support, employment for the custodial parent is the crucial factor.<sup>269</sup> If employment opportunities are absent and children are involved, the increased possibility of poverty will generate an additional incentive for states to preserve marriage and discourage divorce. But the important connection is the state's support for the definition of family constituted by marriage and the support it is willing to provide. If the single woman with children does not include herself in this definition then the state's support lessens and eventually evaporates. This is the crucial shift from past welfare support through AFDC payments.

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See TERRY LUGAILA, U.S. DEPARTMENT OF COMMERCE, HOUSEHOLDS, FAMILIES, AND CHILDREN: A 30-YEAR PERSPECTIVE 42 (1992). In 27.5 percent of the families, both parents worked full-time; in 30 percent, the husband worked full-time, the wife less than year-round full-time; in 21 percent, the wife worked only in the home; and in 21 percent the husband worked less than full-time. See *id.* at 43.

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There are those who would argue that the state should provide greater amounts of public benefits to women, in part because the raising of children is a public benefit and women should be provided with resources to allow for that benefit, whether they live in a marriage relationship or not. See, e.g., Fineman, *supra* note 259, at 2214 ("The approach in this country must change and those women who are caretakers must be given a right to resources to enable them to perform the tasks we demand of them.").

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See Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695 n.14 (1997) (citing SCOON-ROGERS & LESTER, U.S. DEPARTMENT OF COMMERCE, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS, CURRENT POPULATION REPORTS (1991) ("In 1991, 46 percent of the 11.5 million custodial parents potentially eligible for child support did not have an award. Another 11 percent has an award, but actually received nothing. Six and a half million families received no payment at all.")).

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The Act provides six provisions for the collections of child support: (1) New hire reporting within 20 days; (2) mandatory state adoption of the Uniform Interstate Family Support Act; (3) access to all government information, including military files; (4) access to private information related to public utilities, cable television, banks and credit agencies; (5) matching lists of obligors with lists of assets and creation of state registries of support obligations; and (6) expedited procedures which emphasizes administrative initiative to impose liens, seize funds, suspend licenses, and issue subpoenas. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, §§ 313, 316 (codified at scattered sections of 42 U.S.C.). See generally Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Reform Act*, 30 FAM. L. Q. 519 (1996).

The PRWORA became effective on July 1, 1997.<sup>270</sup> The purpose of the legislation was to eliminate Aid to Families With Dependent Children (AFDC) entitlements and replace them with block welfare grants to the states, thus ending a system of welfare which had been in existence for sixty-one years.<sup>271</sup> More precisely, it ended a system of welfare which had provided a federal, cash-based safety net for children, and replaced it with a program which contains the following major provisions:

(1) Imposition of a five-year limit on benefits, although as many as twenty percent of families may be allowed exceptions in hardship situations.

(2) One person in every family must be working within two years after receiving welfare or lose benefits. States must have at least one-half of their single-parent welfare recipients working by 2002.

(3) Elimination, except for some emergency situations, of all federal public benefits for certain aliens such as illegal immigrants and non-immigrants, and students, during their first five years in the United States.

(4) Creation of broad cash welfare and child care block grants to states, allowing them to reform welfare in ways that are appropriate to the individual states, and move families into jobs.<sup>272</sup>

The provisions of the Act complement the implied expectations of its drafters: (1) to put an end to welfare dependency, especially welfare mothers;<sup>273</sup> (2) to stop subsidizing illegitimacy; (3) to introduce the independence of employment – an “opportunity society” – into the lives of parents and their children; (4) to force states into accountability for dollars spent and programs initiated; (5) to revitalize the role of private institutions serving as social welfare nets for the poor; and (6), to save the federal government money. Estimates are that the “new law would save the federal government \$54.1 billion over six years, although most of the savings come not from the ending of AFDC, but rather from other provisions of the welfare

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<sup>270</sup> See Pub. L. No. 104-193, 110 Stat. 2105 § 116.

<sup>271</sup> See MASSARO, *SOCIAL TEACHING*, *supra* note 20, at ix.

<sup>272</sup> *Id.*; *Foreword* to The Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

<sup>273</sup> See generally William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L. J. 1198 (1983); Isabel Wilkerson, *An Intimate Look at Welfare: Women Who've Been There*, N.Y. TIMES, Feb. 17, 1995, at A1.

bill . . . ."<sup>274</sup> Drafters had as a goal the phrase that President Clinton used repeatedly during his 1992 campaign: to end welfare as we know it.<sup>275</sup> This goal was a key feature of the House Republican Contract with America, and culminated decades of debate over how best to strengthen a process of support for children which had begun with the New Deal.<sup>276</sup>

Much has been written about the future consequences of the new welfare law. It has been asserted that block grants to the states will disproportionately harm certain segments of the population which have traditionally suffered from the lack of uniformity in program standards.<sup>277</sup> Others complain about "soft time limits" which allow for states to apply to reduce time limits of entitlement or expand them when there is hardship.<sup>278</sup> Others argue that time limits ought not to be used at all, but instead there should be programs which would ease people into the workforce.<sup>279</sup> The work requirements, the major element of the welfare legislation, have evoked most comments because of past efforts to place welfare recipients in jobs.

The federal legislation allows states to develop work requirement programs as they deem proper but already there are complaints. For example, "Millions of dollars in federal welfare-to-work funds have been funneled to California for job training programs, but much of it remains unused, mired in governmental red tape and shifting priorities."<sup>280</sup> Few specifics are available, but a series of conditions involving the work requirements must be met before a state may receive its grant from the federal government. Thomas Massaro describes what is necessary:

First, to avoid penalties such as the forfeiture of part of their block grant, the states must enforce minimum work participation rates for their welfare caseloads. The annual participation rate starts with an initial 25 percent in 1997 and rises by increments to 50 percent in 2002. Second, the law lists twelve categories of activi-

<sup>274</sup> MASSARO, SOCIAL TEACHING, *supra* note 20, at ix.

<sup>275</sup> Drafters of the new legislation were led by House Speaker Newt Gingrich. A summary of his plans may be found in his book, NEWT GINGRICH, TO RENEW AMERICA at ch. 2 (1995). In addition, see generally RESTORING THE DREAM: THE BOLD NEW PLAN BY HOUSE REPUBLICANS (Stephen Moore ed., 1995).

<sup>276</sup> Major contributors to the thinking which brought about welfare reform are: Charles Murray, who has written both *In Pursuit of Happiness & Good Government* (1988) and *Losing Ground: American Social Policy 1950-1980* (1984); Lawrence M. Mead, who has written *The New Politics of Poverty: The Nonworking Poor in America* (1992) as well as *Beyond Entitlement: The Social Obligations of Citizenship* (1986); and George Gilder, who wrote *End to Welfare Reform as We Know It*, *The American Spectator*, June 1995, at 24.

<sup>277</sup> See KATHERINE MCFATE, MAKING WELFARE WORK: THE PRINCIPLES OF CONSTRUCTIVE WELFARE REFORM 33 (1995); Margaret Weir, *Urban Poverty and Defensive Localism*, *DISSENT*, Summer 1994, at 338-41.

<sup>278</sup> The term is appropriate to a project of the governor of Michigan called "Project Zero." See Jason DeParle, *Aid from an Enemy of the Welfare State*, *N.Y. TIMES*, Jan. 28, 1996, at D4.

<sup>279</sup> See Report and Recommendations on H.R. 4, "The Personal Responsibility Act of 1995," 50 REC. ASSOC. OF BAR OF CITY OF NEW YORK 493-521 (1995).

<sup>280</sup> Carla Rivera, *Welfare-to-Work Effort Awash in Unused Funds*, *L.A. TIMES*, May 31, 1999, at A1.

ties in which recipients may engage in order to be counted toward their state's work participation rate. Included are an "upper track" of seven categories of direct engagement in work (in the private or public sectors, including community service and subsidized on-the-job training) and a "lower track" of work preparation activities (attending secondary school, vocational educational programs, and job skills training). No more than 20 percent of a state's recipients may count toward its work participation rate through this second category of work activities. Third, the law sets a minimum number of hours per week for participation in these activities in order for recipients to count toward the state's work percentage goals. This requirement starts at twenty hours for single parents and rises in stages to thirty hours after 2000.<sup>281</sup>

Requiring welfare recipients to work is the capstone of the new legislation; work is the solution to welfare dependency. But of course this presupposes that work will be available and work will lead to self-sufficiency. The premise of the work solution has provoked the most controversy. Indeed, even before the new welfare legislation was passed, angry remarks were directed towards those who would make accusations "at the most defenseless people in our society [to] stigmatize and dehumanize them."<sup>282</sup> For Professor Martha Fineman, work requirements distort the problem and allows proponents of change to make false and misleading accusations about those people – mostly women – who receive welfare. Thus,

The essence of the so-called "welfare trap" is not that welfare warps women's personalities or makes them pathologically dependent, though that may occasionally happen. The essence of the "trap" is that while welfare pays badly, low-pay jobs pay even worse. Most welfare mothers are quite willing to work if they end up with significantly more disposable income as a result. But they are not willing to work if working will leave them as poor as they were when they stayed home.<sup>283</sup>

State and federal legislators will see little merit in the unwillingness of

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<sup>281</sup> MASSARO, SOCIAL TEACHING, *supra* note 20, at 102. To date, the state of Maryland has been the most successful in eliminating welfare recipients from its rolls. See Kamen, *supra* note 262, at A7 ("The state registered a 55 percent drop since 1993, going from 221,338 recipients to 99,852.").

<sup>282</sup> Fineman, *supra* note 259, at 2193. See also MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT (1988); NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY (1989).

<sup>283</sup> Fineman, *supra* note 259, at 2193 n.32 (quoting from Christopher Jencks & Kathryn Edin, *The Real Welfare Problem*, 1 AM. PROSPECT 31, 43-44 (1990). See also LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 (1994); Iris Marion Young, *Making Single Motherhood Normal*, DISSSENT, 1994, at 88.

welfare recipients to work in low paying jobs; the solution would be for them to progress to better pay and more responsibility. This is the promise of American individualism and a distinctive philosophy of economic liberalism.<sup>284</sup> But the fact of the matter is that there are cogent arguments to support the argument that there are particular "environmental factors which block [employment] opportunity for residents of inner-city America."<sup>285</sup> And if these factors prevent welfare recipients from working the new welfare legislation eliminates subsistence. The government policy has made a decision about entitlement, but it has also made a decision about the definition of family and who deserves support in providing public service. This is the argument made by Professor Fineman.<sup>286</sup>

The clash between Professor Fineman's approach and that of the new welfare legislation is over the merit of paying adults, mostly women, to stay home and raise children. Most of these children would be non-marital, contributing to what welfare legislation sponsors termed the "promiscuity entitlement."<sup>287</sup> And since the vast majority of these children will be borne into poverty,<sup>288</sup> the rationale is to reduce welfare payments and thus reduce the incentive for women to have children without two parents actually committed to their financial support. Family welfare caps and other measures making it less advantageous for women to give birth without the ability to support the child is now the responsibility of the states. Programs which the states adopt to increase work and to decrease the number of non-marital children will continue a policy and an American consensus as to what constitutes a traditional family, what is deserving of government economic support, and what constitutes value. The fact that the state forces these women into a family structure of two-parents in a marital relationship goes to the essence of Professor Fineman's argument. She argues that having children is per se worthwhile and entitles the mother who raises that child to state support.<sup>289</sup> Having the child outside of marriage is not promiscuous. In defining it as such, the state is forcing a woman to choose a medium of family structure based on religious tradition and common usage; it deprives the single mother of worth because it strips her of her individuality.

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<sup>284</sup> For a discussion of welfare and its conflict with American ideals, see MASSARO, *SOCIAL TEACHING*, *supra* note 20, at 64-67. See generally BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL DEBATE* (1994).

<sup>285</sup> MASSARO, *SOCIAL TEACHING*, *supra* note 20, at 212. See generally NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986) [hereinafter *ECONOMIC JUSTICE FOR ALL*]; WILLIAM JULIUS WILSON, *THE WORLD OF THE NEW URBAN POOR* (1996).

<sup>286</sup> "The institution of marriage is seriously offered as the uniquely appropriate form for social policy, and systems of proposed disincentives to keep unmarried women from reproducing are debated by a multiplicity of predominantly male politicians in various halls of power." Fineman, *supra* note 259, at 2195.

<sup>287</sup> Gilder, *supra* note 276, at 26 (1995).

<sup>288</sup> See BEYOND RHETORIC, *supra* note 2, at 19 ("In 1960 only 5 percent of all births in the United States were to unmarried mothers; in 1988 more than 25 percent were. Today, more than a million babies each year are born to unmarried women."). "Among children living with only their mothers, sustained poverty for seven or more years is common; among children living with both parents it is rare." *Id.* at 83.

<sup>289</sup> See Fineman, *supra* note 259, at 2211.



It deprives her of state-sponsored support in her decision to raise a child alone.<sup>290</sup>

There are other critics of the new welfare legislation. They argue that work requirements, restrictions on non-marital births and other policy goals only enforce traditional family norms, allow racial and gender discrimination and unjustly withdraw government from economic support.<sup>291</sup> They argue that the government is forcing women into stereotypes without providing support for the unique and irreplaceable role they choose or to which they are consigned. Single women with children should not be deprived of support as a group, but each case should be examined individually with the premise being that each be provided with income support and not work requirements. In his 1981 encyclical, *Laborem Exercens*, Pope John Paul II supports the traditional gender and family roles of past pronouncements, but he also supports a "welfare policy which insures a single mother the ability to delay her entry into paid employment until her children are of school age."<sup>292</sup> The Pope writes:

It will redound to the credit of society to make it possible for a mother – without inhibiting her freedom, without psychological or practical discrimination, and without penalizing her as compared with other women – to devote herself to taking care of her children and educating them in accordance with their needs, which vary with age. Having to abandon these tasks in order to take up work outside the home is wrong from the point of view of the good of society and of the family when it contradicts or hinders these primary goals of the mission of a mother . . . .<sup>293</sup>

The Pope's comments indicate that he and the church he leads would support the traditional definition of family as the norm. Yet, he joins others less inclined to adopt a traditional role or definition of family, and indicates a preference for economic support policies under conditions which *foster* work, rather than *mandate* it. The mother and child are important, regardless of whether the child is born into a non-marital relationship, and though the child may be a result of promiscuity, that does not diminish the worth of the child or the entitlement of the mother to a support level which would maintain her dignity and that of her child. The balance is not between the promiscuity entitlement and self-sufficiency, but rather between a child in poverty and a program which actively assists the parent.

The United States Catholic bishops are among those who criticize the new

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<sup>290</sup> See *id.* at 2213.

<sup>291</sup> See generally MASSARO, SOCIAL TEACHING, *supra* note 20, at 76-77; D. ERIC SCHANSBERG, POOR POLICY: HOW GOVERNMENT HARMS THE POOR (1996); BEN J. WATTENBERG, VALUES MATTER MOST (1995); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA 1820-1920 (1978).

<sup>292</sup> MASSARO, SOCIAL TEACHING, *supra* note 20, at 140.

<sup>293</sup> *Id.* (quoting *Laborem Exercens* at § 19).

welfare law for its reliance on work as the solution to dependency.<sup>294</sup> Individual solutions are preferred by the bishops and, for example, government-sponsored job preparation programs are a prerequisite when work is possible. The bishops' voices are distinctively important since they and their constituents are responsible for a vast network of charitable organizations. These agencies and those of other religious organizations derive more than fifty percent of their operating budgets from government funds.<sup>295</sup> When government programs halt payments to women and their children, these agencies will be impacted with increasing numbers of people unable to meet the new welfare work requirements. The ability of these agencies to meet an increased demand is questionable. According to Rev. Fred Kammer, president of Catholic Charities USA:

If the religious communities alone were expected to make up for the proposed cuts in government social spending over the next several years, the task of replacement would require an average annual increase of \$225,000 in resources devoted to charitable works from each of the nation's 258,000 churches, synagogues and mosques. As a point of comparison, the average total budget of a congregation is only \$100,000 per year.<sup>296</sup>

If charitable efforts cannot meet the demand brought on by the decreasing federal support, then people, particularly children, are at risk. Thus, "social policy is constrained by a prohibition against harming poor children, or even serving as an accomplice in situations where innocent children are placed at risk by the irresponsible behavior of their parents."<sup>297</sup> After six decades of dependency, if government withdraws income guarantees "[w]elfare mothers may thus find themselves forced into desperate exchanges, choosing among items on a list of degrading social options which few would defend."<sup>298</sup> Among these social options would be prostitution, abortion, clinging to abusive boyfriends or abandoning children. These welfare mothers and their children would best be served through a program of incentives: "We must be willing to build into our welfare system responsibility and accountability on the part of both the recipient and the giver of public assistance."<sup>299</sup>

Critics of the *giver* of public assistance object to the new definition of who is worthy to receive public assistance. When the government mandates work the

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<sup>294</sup> The bishops have established their own agenda for welfare reform. See ECONOMIC JUSTICE FOR ALL, *supra* note 285, at 186-214.

<sup>295</sup> In 1994, Lutheran Social Ministries, Catholic Charities USA, and the Jewish Federations received between 54 percent and 62 percent of their operating budgets from government spending. See Milt Freudenheim, *Charities Say Government Cuts Would Jeopardize Their Ability to Help the Needy*, N.Y. TIMES, Feb. 5, 1996, at B8.

<sup>296</sup> MASSARO, SOCIAL TEACHING, *supra* note 20, at 84.

<sup>297</sup> *Id.* at 159.

<sup>298</sup> *Id.* at 160.

<sup>299</sup> *Id.* at 162 (quoting CATHOLIC CHARITIES USA, *supra* note 51, at 12).

effect is to force real women and their children into situations of moral depravity, something some of the nation's religious organizations find abhorrent. The compromise offered by the critics of the government action is to emphasize the structure and the viability of marriage while at the same time providing for those who, because of a variety of reasons, cannot meet that goal now. Thus, public policy initiatives are recommended which would strengthen the family, foster responsibility, not singularly denigrate welfare dependency. The bishops and other critics of the welfare legislation share with Professor Fineman a respect for the reality of choices being made by individuals.<sup>300</sup> If the situation had been different and the welfare recipient had purchased a home, been able to open a IRA or a Keogh Plan, had been able to marry, or been able to make itemized deductions to a charity, the federal policy makers would have provided economic support. The argument of critics of the new welfare legislation is that welfare recipients make a contribution by raising children and should be entitled to receive support even though these children are not the product of a definition of family defined as marriage.

Thus, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 restricts the definition of family. In so doing, it reawakens marriage. If, thirty years after the advent of no-fault legislation, private groups and state legislatures are seeking to reinvigorate the tradition and definition of marriage, the approach of the PRWORA is too abrupt and too harsh. Professor Fineman, Catholic bishops and a host of other social advocates would agree on this point. The legislation wants to be somewhere, the location of which has either been forgotten or the journey too difficult to go alone. If advocates of a definition of family based upon marriage want to make this the norm again, the process must be gradual and assisted. The Florida legislation is better; the goal of process permeates the Florida statute protecting marriage and preserving family. The Florida legislature makes education mandatory in high school and seduces marrying couples into taking pre-marital courses and pre-divorce counseling. Assistance and process are important. Likewise, fairness in welfare policies demand no less of a process.

Catholic Charities USA offers ten social objectives which would replace the welfare legislation's abrupt withdrawal of economic support. Each contributes to a process which would take a welfare recipient from dependency to self-support. The premise is that the definition of family incorporates marriage and mutual commitment. But it is realistic of family structure and choices already made. The ten objectives are:

(1) A vibrant economy must provide career opportunities;

(2) all workers need a level playing field;

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See *id.* at 165 ("We must resist the temptation to see poor women, minority families, or immigrants as either passive victims or easy scapegoats for our society's social and economic difficulties."). The National Commission on Children also recommends that government and private sector employers establish family-oriented policies and practices, including family and medical leave, work schedules, earned income credit, health care, juvenile services, parenting classes and tax programs such as the earned income credit, to strengthen families. See BEYOND RHETORIC, *supra* note 2, at xxix-xxxii.

- (3) the educational system needs major changes;
- (4) adequate health care must be available;
- (5) the supply of affordable housing must be increased;
- (6) our society must provide greater support for family life;
- (7) quality, affordable child care should be universally available;
- (8) our society must place renewed emphasis on the value of marriage;
- (9) teenagers and young adults must have attractive life-options;  
and
- (10) America must address both the societal roots and the individual episodes of domestic violence.<sup>301</sup>

Interestingly, these social policy goals of the bishops mirror those of the United States Congress's National Commission on Children and the legislative findings of the Florida legislature. All emphasize the importance of fostering a strong family to provide economic, emotional and developmental structure for children and adults. These goals do not share the same premise as the new welfare legislation. The PRWORA's objective is one of cessation of benefits rather than provision of support. Comparisons will have to be made to determine the effectiveness and consequences of the new welfare legislation. To date, the full effect of the welfare changes have not been documented; this will be difficult because federalism has replaced the uniformity of AFDC.<sup>302</sup>

Congress is modifying the welfare legislation by enacting into law elements of the bishops' social policy goals. To wit, there are tax incentives for busi-

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<sup>301</sup> MASSARO, SOCIAL TEACHING, *supra* note 20, at 165 n.36 (quoting CATHOLIC CHARITIES USA, *supra* note 51, at 4-5).

<sup>302</sup> See *id.* at 255 ("There are in place fifty different systems featuring various combinations of policies on time limits, work requirements, family caps, interstate migration, and subsidized employment."). Some of the state efforts have already been declared unconstitutional. For example, state efforts to mandate residency requirements before traveling persons may receive welfare benefits. See *Saenz v. Roe*, 67 U.S.L.W. 4291 (1999).

nesses to hire former welfare recipients, Medicaid protection has been extended to half the country's uninsured children, and there are minimum wage guarantees for welfare recipients entering the workforce. Nonetheless, the block grant programs still require the state to enforce time limitations on benefits, and work requirements for single parents of children.<sup>303</sup> More changes will ensue and increased litigation and social results will provoke critics and supporters to hasten changes.<sup>304</sup> Should the country experience a severe economic recession the conditions for persons without an economic safety net will become exacerbated. In the meantime, the new welfare legislation seeks to fit mostly single mothers into a goal of family definition for which they are neither prepared nor now supported. They and their children are thus at risk.

## V. CONCLUSION

When Louisiana and Arizona codified the possibility of covenant marriage for their citizens, the legislatures recognized a growing sentiment in those states for a reawakening of marriage. While covenant marriage restricts covenanting parties to a fault-based divorce, the purpose of the legislation and the theme of its religious-oriented supports is the strengthening of marriage. The impracticality of covenant marriage will negate its effectiveness, but the renewed attention to marriage begun in Louisiana, Arizona and other communities across the country will continue to grow. Florida's Marriage Preparation and Preservation Act is the most recent example and other states will likely adopt legislation to conform to a new appreciation for marriage and the economic stability it could bring to adults and to children.

Three undercurrents have brought about this cultural shift from no-fault to covenant marriage. One is the litigation which surrounds the opportunity for persons of the same-sex to marry. Newspapers and political pundits debated the merits of marriage and in so doing educated citizens about an institution ignored, or worse, moribund. People have formulated thoughts about what marriage is and can mean in the lives of adults and children. Second, the new federal welfare legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, put an end to sixty-one years of minimum economic support for welfare recipients, mostly single mothers. By replacing the economic safety net of welfare payments with work requirements, the federal government chose as a norm a new definition of family: an economically sufficient single parent or two working parents, presumptively in a marriage relationship. No longer would the government

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*See* MASSARO, SOCIAL TEACHING, *supra* note 20, at 256-57.

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*See, e.g.*, ANDREW BUSH ET AL., OFFICE OF POLICY AND PROGRAM ANALYSIS, LEAVING WELFARE: FINDINGS FROM A SURVEY OF FORMER NEW YORK CITY WELFARE RECIPIENTS (Sept. 1998); HUMAN RESOURCES ADMINISTRATION, GENERAL ACCOUNTING OFFICE, WELFARE REFORM: STATES ARE RESTRUCTURING PROGRAMS TO REDUCE WELFARE DEPENDENCY (June 1998); DAN BLOOM ET AL., MANPOWER DEMONSTRATION RESEARCH CORPORATION, THE FAMILY TRANSITION PROGRAM: IMPLEMENTATION AND INTERIM IMPACTS OF FLORIDA'S INITIAL TIME-LIMITED WELFARE PROGRAM (April 1998).

support single mothers raising children by themselves. Such a prompt shift in a definition of family is commensurate with a reawakening of marriage and discouragement of individual choices. Third, state secular authorities are increasingly accommodating "faith-based moral principles" into neutral state objectives. The Florida legislation providing for marital and divorce counseling is such an example of faith-based incorporation by secular authorities. Thus, promotion of the religious institution of marriage is accommodated in the state purpose of providing stability and economic commitment within a family unit. State interaction with religious organizations will reawaken marriage and offer opportunities for state and religious organizations to achieve individual objectives.

These three societal undercurrents prompt the reawakening of marriage. Covenant marriage, restriction on no-fault divorce and covenant communities are all ramifications of this reawakening. Eventually, the state, for better or for worse, will initiate more objective standards for marriage. The state is choosing marriage as a social institution, indeed, an optimum social organization and current voluntary efforts at premarital counseling, parenting classes and mandatory counseling upon divorce will increase. In addition, the states will increasingly adopt the current voluntary programs into its secular educational efforts and mandatory premarital classes. If the state utilizes religion-based programs to provide this education, new opportunities will arise for the religious denominations currently conducting the programs and for sociologists who will then be able to monitor more closely the results.

If the institution of marriage does enjoy a reawakening, the issue then arises as to the effect upon less formal personal commitments, domestic partnerships being one example. Will a renewed emphasis on marriage hinder or help domestic partnerships or will all coexist? Whatever the outcome, the conclusion is inescapable that there has been a shift in attitude, one which has seen a reawakening of an appreciation of that which has been a staple of human relationships from Adam and Eve until the present.

